IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1282/7/7/18
1289/7/7/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

8 May 2019

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)
DR WILLIAM BISHOP
PROFESSOR STEVEN WILKS

(Sitting as a Tribunal in England and Wales)

BETWEEN:

(1) UK TRUCKS CLAIM LIMITED
(2) ROAD HAULAGE ASSOCIATION LIMITED Applicants

- and -

(1) IVECO
(2) DAF
(3) DAIMLER
(4) MAN Respondents

- and -

VOLVO/RENAULT Objector

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PRE-HEARING REVIEW

A P P E A R AN C E S

Mr Rhodri Thompson QC, Mr Adam Aldred and Mr Doug Cochran (instructed by Weightmans LLP) appeared on behalf of the Applicant, UK Trucks Claim Limited.

Mr James Flynn QC, Mr David Went and Miss Emma Mockford (instructed by Addleshaw Goddard LLP and Backhouse Jones) appeared on behalf of the Applicant, Road Haulage Association.

Ms Kelyn Bacon QC, Mr Tony Singla and Mr Matthew Kennedy (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Respondent Iveco.

Mr Daniel Beard QC, Mr Rob Williams and Mr David Gregory (instructed by Travers Smith LLP) appeared on behalf of the Respondent DAF.

Mr Paul Harris QC and Mr Michael Armitage (instructed by Quinn Emanuel Urquhart & Sullivan LLP) appeared on behalf of the Respondent Daimler.

Mr Daniel Jowell QC and Mr Tom Pascoe (instructed by Slaughter and May) appeared on behalf of the Respondent MAN.

Miss Sarah Abram (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Objector.

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THE PRESIDENT: Good afternoon everyone. The proceedings are being live-streamed to court 2, because not everyone could fit in to court 1. There is some, but rather limited, confidential material in the bundles that we have been given. I rather doubt that anyone will have any need to refer to that in the course of this pre-hearing review, but if you do we have marked up copies highlighting confidentiality, so we hope it will not be necessary, even if that has to be looked at, to actually read anything out. If anybody thinks that it is necessary then we will have to consider going in camera, and if we did that then the live-stream, of course, will be turned off.

Can I say at the outset, the Tribunal has had a letter from a company seeking to object to one of the applications for a collective proceedings order. That is a letter dated 2 April 2019, from a company called SP0117 Limited, which is an assignee of the claim belonging to Charthire Limited, which, as its name suggests, was a commercial truck hire company. I take it, and I understand from the replies, that the applicants have seen this letter. What the director of that company says is that he opposes the application by the RHA, but supports the one of UKTC, on the basis that the RHA claim excludes a hiring company, such as Charthire was, but UKTC includes a hiring company. I think - is that right, Mr Thompson - in fact, your claim also excludes companies that are hirers?

MR THOMPSON: I think we have sought to address that in our reply. What we are seeking to do is to have one claimant per truck, as it were. I do not know the particular facts of Charthire, whether it would, as it were, be the purchaser of the individual trucks or whether it would be the intermediary, and its sub-lessees would be the acquirer from our point of view.

THE PRESIDENT: I think what they say is they purchased 500 trucks, or over 500 trucks, but they purchased them and then let them out to hauliers, or people in need of trucks, and they consider that they would be included in your claim. I know it is addressed in replies, but I am not sure that the objector is going to necessarily wade through, if I can put it that way, the replies, and it would be neater if we can just have a clear statement of the position today.

MR THOMPSON: Yes. Insofar as they are commercial purchasers for commercial use, then they would fall within our claim, but the sub-lessees would not. It would obviously depend on the particular facts. What we are seeking to do is to exclude the manufacturers and the finance companies. I think Mr Harris' client has raised a question about where exactly one draws the line. That is partly a matter of definition and partly a question of fact. For the moment I do not know enough about the facts of Charthire as to whether or not they would fall within our proposed class or not.

THE PRESIDENT: Because there is a potential of your claim being an opt out, so on that basis it is necessary to be absolutely clear without looking at each individual who is within the class. If we just look at your application for a moment, UKTC bundle 1, or A1, you have defined the class in para.1, as persons who, between 17 January 1997 and 18 January 2011, have acquired one or more new medium or heavy trucks registered in the UK, and you explain that "acquired" means "purchased or took possession and operated pursuant to an operating lease", and so on. Then in para.3 you say that a number of specified categories of persons should be excluded from the proposed class, and then that we see explained in the proposed order at tab 27.

MR THOMPSON: Yes.

THE PRESIDENT: In the proposed order at p.521, tab 27, you define an operating lease, "the contract allows for the use of an asset, but does not convey rights of ownership of the asset". At para.10 is the list of excluded categories. 10(b) is any lessor in respect of an operating lease. So that was the basis on which I thought, but you will correct me if I have misunderstood it, that if a company buys trucks, and therefore is an acquirer, but then lets them out under operating leases it is excluded from the class.

MR THOMPSON: Yes, I understand the point that is being put to me. I think it was raised by way of clarification. I think what we have sought to clarify in the reply is that it will partly be a question of fact in terms of who is, as it were, the first substantial user of the truck. I think we would have to accept that there is likely to be some form of grey area. What is clear is that if the lessor, for example, is Barclays Bank, then that is not intended to be caught within the class. If the acquirer is a commercial company who lets out the trucks on a relatively short term basis, but is, as it were, a commercial entity who is, for example, maintaining the trucks and letting them out, then that party may have a significant fleet of trucks and will fall within our class. I think that is precisely the issue that has been raised by Daimler, I think, and also Iveco, and I suspect may be a topic that we will return to at the substantive hearing. I am reluctant to over-commit myself at this stage, particularly in relation to the facts of an individual company, or group of companies that I have not studied the detail of.

THE PRESIDENT: So the position is that, as far as Mr Wilson and this company is concerned - is this right - they may fall within UKTC's proposed class? Is that right?

MR THOMPSON: Yes, we have sought to address it, particularly at para.64 of our reply. It is p.22 of the reply, paras.64 and 65.

THE PRESIDENT: Yes. It may be that all we can do is respond to Mr Wilson quoting paras.64 and 65 and saying that when this was raised it was not clear whether the company of which he is a director is excluded. Would that be right?

MR THOMPSON: As far as I recall it was a one page letter.

THE PRESIDENT: Yes, it is.

MR THOMPSON: It would obviously be open to, is it Mr Wilson, to provide more details of what his business model was, and that might indeed inform this debate and be a useful addition.

THE PRESIDENT: I just want to let him know the position as it stands without engaging in correspondence.

MR THOMPSON: Yes.

THE PRESIDENT: If there was some suggestion that he had misunderstood the position and that his company would be excluded in any event, but you say that is not necessarily right.

MR THOMPSON: Yes, I think we have sought to explain ourselves at paras.64 to 66 of the reply. No doubt there will be some discussion about whether that is the very best formulation that there could be at this stage.

THE PRESIDENT: Yes, but you tell me that, simply on what he says, namely that they purchased 500 trucks and they were a commercial truck hire company, that on its own is not enough to tell you whether he is in or out of the claim.

MR THOMPSON: I think our intention on that principle would be that they would be in the claim and that the sub-lessor would not be, but it would depend very much on the facts, because if, in reality, what I have called the sub-lessor was taking the substance of the contract, for example, for a ten year sub-lease, then it might well be that the sub-lessor was the correct claimant.

THE PRESIDENT: I see, yes. We can draw his attention to this exchange in the transcript.

MR THOMPSON: I am grateful, Sir.

THE PRESIDENT: I think that is sufficient to deal with the point. Yes?

MR FLYNN: Perhaps I could say that footnote 1 of our reply shows that we were suffering from the same confusion as to the scope of the UK Trucks Claim Limited's claim. That footnote is the source of the suggestion that Mr Wilson's objection proceeded on a misconception, and we were surprised to read paras.52 and 64 to 66 of UKTC's reply, because that is not how we had understood it either.

THE PRESIDENT: It was based on that that I raised the point.

MR FLYNN: Thank you, Sir. Ours is based on our understanding of their claim.

THE PRESIDENT: I think then we move on. Clearly a major matter we have to address is the implications of the Court of Appeal's judgment in *Merricks*, and what we understand is an application about to be lodged with the Supreme Court, we are told next week, for permission to appeal. Because of its implications for *Merricks* and indeed other cases, representations may be made to the Supreme Court to address the petition or application for permission quickly. Obviously we will not know the outcome of that before the date fixed for the hearing, if it goes ahead, of these applications. You have all very helpfully addressed that in your written submissions for today, which all three members of the Tribunal have read. I think the sensible thing is for you to address us, I hope relatively briefly, by way of any additional comment, particularly the applicants having seen the objections of the respondents, and then to hear from the respondents, either each of you, or it may be that you have agreed that one of you takes the lead on this point. We do not need repetitive submissions obviously. If we turn to the applicants, first, Mr Thompson, do you want to go first?

MR THOMPSON: Yes. I am grateful, Sir. In terms of this issue, in addition to correspondence and our reply, we have addressed this at paras. 4 to 8 of our skeleton. If I could take it under three broad headings, first of all, the issue of prejudice, which we address at para. 7.2, we submit, in broad terms, it would be a curious and undesirable outcome if the effect of the Court of Appeal ruling was to be a form of red light to the CPO regime pending the Supreme Court appeal, the effect being to make it more difficult and slower for all such applications. We say that is clearly not the Court of Appeal's intention or conducive to the administration of justice or the overriding objective. There has been some comment on the point that we referred to in relation to limitation, and the President indeed will recall that in the case of *Gibson* or *Pride*, that this question is a vexed one, and we are concerned that there is a risk to individual claimants who wish to avoid the need for either an individual or GLO type High Court claim with time running against them.

THE PRESIDENT: We did not quite understand the limitation point, so perhaps you could explain it?

MR THOMPSON: Yes. There is a question about which claims have actually been brought at this stage. There is a suggestion from some of the cartelists that it is not an issue because time has already expired for individual claims. That does not inspire confidence in us that the issue has been waived in relation to individual members of the proposed class.

THE PRESIDENT: Can you just explain the point, because we have not understood the point?

MR THOMPSON: Well, the point is that if that is right, and if the CPO applications in this case are ultimately refused, then the only remedy for individual claimants will be to bring individual proceedings, presumably individual High Court proceedings, where time is running against them. That is a significant issue, particularly for smaller claimants who we say are very likely to be dependent on this regime for any effective remedy against these cartelists. We are not really clear what the Road Haulage Association says about this.

THE PRESIDENT: Leaving aside what other people say about it, what you say about it, as I understand it, is if the application were to be refused say in a judgment - suppose this goes ahead and judgment is given in September and it is refused, you may then seek to appeal. You are saying what, that the individuals in your class might want to start High Court proceedings - have I got that right?

MR THOMPSON: We brought our claim in May 2018, and so anyone who was thinking about litigating at that stage would have thought, "That is very good, there is a CPO going on here, let us see what happens", and they might have thought that it would have been resolved by now. If, in fact, the certification is not even heard until, say, 2021----

THE PRESIDENT: You say they would have known back in December that it would not be resolved by now, but----

MR THOMPSON: Yes, exactly, but they would not have known that it might not be resolved until 2021 if we all sit on our hands until the Supreme Court has ruled on an appeal, by which time it will be five years after the decision. The concern we have is that at that point the cartelists, who have shown every indication that they will take all points available to them, would have every incentive to push things back even further. One of the reasons why we brought this claim when we did, and why we brought it on an opt out basis, is that it appeared to us beyond argument that all the claims had been brought by those claims brought in May 2018. If this process spins out and takes three or four years to resolve, then people who may have thought, "That's a good idea, we don't need to do anything", may suddenly find themselves confronted with a very unenviable prospect of suing these cartelists with every risk that they will take whatever legal or procedural points that are available to them. That is the concern.

THE PRESIDENT: I am still not entirely clear - I am sorry, Mr Thompson, if I am being obtuse - I have no doubt that the respondents may take every defence available to them if they are sued by anyone. It is the particular defence of limitation that I am trying to understand. You start in May 2018. Accepting what you say, no limitation issue arises for any of the claims, and I do not think any limitation defence has been raised in any of the responses, so

there is no limitation issue. If, having started, suppose you get a decision in September 2019 refusing certification, and that is where we are now, at that point you say people in the class could start High Court proceedings - is that what you are saying?

MR THOMPSON: They could in principle, yes.

THE PRESIDENT: They might face a limitation defence, I do not know. That would, if they start in late 2019, takes it back to 2013, I suppose, in the High Court.

MR THOMPSON: Yes.

THE PRESIDENT: If we do not proceed until the Supreme Court gives judgment and therefore this case is heard - let us suppose it is heard, if the Supreme Court proceeds with reasonable speed knowing that there are cases awaiting the outcome, and this case is then heard in September 2020, with a judgment in December 2020, and if it is then refused, they could then start High Court proceedings in January 2021, and again - is this it - it might finish a limitation defence at that point?

MR THOMPSON: Yes, or they may find that their claims are more limited in time because of the passage of time.

THE PRESIDENT: Is that the passage of time that you are referring to?

MR THOMPSON: Yes. We have addressed the matter in more detail in our reply and appendix 4.

THE PRESIDENT: Yes, I read that and, as I say, I did not quite understand it. That is why I am asking you.

MR THOMPSON: I think the Tribunal will recall that in *Pride* there was some quite complicated reasoning about how any of this worked.

THE PRESIDENT: *Pride* was a very - I do recall *Pride*, I do not know if my colleagues will, it was a quite different problem, a wholly different problem, about spanning with a transitional regime and the limitations in four collective actions. I do not think anyone is suggesting that your application for a collective action, for collective proceedings, will face a limitation problem only if the hearing is adjourned. You have lodged that application. If the hearing is adjourned it does not affect limitation as regards the collective proceedings.

MR THOMPSON: No, but it potentially affects - if the CPOs are refused - the rights of individual claimants.

THE PRESIDENT: Yes, and that is quite different from *Pride*.

MR THOMPSON: And we have a concern which has not really been bottomed out as to whether it might be said that individual claimants who have failed to opt in within a particular timescale, it may be too late for them to opt in to the collective proceedings. It is not a point

that has been taken. At the moment there is no incentive for that point to be taken and we are, to put it at its lowest, concerned about it. That is an issue that we put in our reply.

THE PRESIDENT: I see, yes, so they are two quite separate points - is that right?

MR THOMPSON: Yes. Again, I do not want to - it was simply that the issue was raised, and so this is simply trying to set out what the concern is.

The other point that was raised was prejudice to the respondents and objectors arising from the fact that they would have to deal with the Court of Appeal ruling in *Merricks* and our reply in a relatively constrained timescale. We say there is really nothing in that to put in the balance. The Tribunal will recall that they pushed back time for their responses because they said that they needed extra time. They then caused delays by the confidentiality claims that Daimler and Iveco asserted, and they chose to serve very lengthy response and objection documents, plus very lengthy evidence and expert reports, approximately 300 pages of responses and objections and approximately 300 pages of expert reports. UKTC was bound to respond and put in a 50 page reply, admittedly with appendices, and a 28 page expert report which, in my submission, is a model of relevance, clarity and focus, and was deliberately concise and focused on the main points of criticism. It does not appear to me credible that these types of defendants, with these types of legal resources which they are clearly devoting to the case, are unable to address either the implications of the Court of Appeal ruling in their skeleton arguments or the points that we have raised in response to their lengthy documents and expert reports also in their skeleton arguments. So we would say that is exactly what they would have expected, and indeed Daimler expressed some concern back in March which the Tribunal rejected as a basis for putting back the hearing, and, in my submission, that was entirely correct and the position has not changed because the Court of Appeal in fact ruled in the timescale that was anticipated throughout.

So we would say there is no prejudice to the cartelists to put in the balance.

It is not meant to be an unkind remark but Dr Lilico's report was obviously in contrast with the extremely long report from Dr Davis, and we would say that if there is any prejudice it would result from the conduct of RHA and not from UKTC.

THE PRESIDENT: I can see the point you make. Of course, we do have to hear the two together, even if the criticism lies elsewhere.

MR THOMPSON: The second point we take is effectively a point of legal certainty, which we spell out in para. 7.1. We say that at the moment it is not really clear what might be appealed, or when it would be resolved, and we contrast that with the sort of case where a judgment turns on a point of law, and it is known that the Supreme Court is about to rule on

that point of law. We say this is much more like cases coming through for summary judgment in circumstances where the Court of Appeal or the Supreme Court is giving a ruling on how to address issues of summary judgment, and you could not possibly have all cases of that kind put on the back burner until the issue has been decided. Clearly, each case turns on its own facts, but we say that the uncertainty here militates against any delay in resolving these CPOs, or these applications.

Then the third issue, and this is where I think the respondents have mainly directed their fire, we say that there are likely limited consequences of the appeal for the present actions. I think it is probably most helpful to look at paras.52 to 58 of the Court of Appeal ruling, and particularly the first sentence of para.52 is, in my submission, is revealing, because it says:

> "Although the CAT rejected the idea that they should carry out some form of mini trial, that is in our opinion more or less what occurred."

So insofar as it is said that there is some dispute about whether or not there should be a mini trial, it is clear that it was agreed by the Tribunal itself, and was not a matter of dispute, that a certification process of this kind is not a mini trial. That was one of the points that the Court of Appeal was concerned to stress and their finding, rightly or wrongly from the perspective of the Tribunal, was that the conduct of this hearing with Mastercard and Mr Merricks was more or less a mini trial. In my submission, the legal question is not really in dispute, and it is unpromising material for the Supreme Court to look again at whether or not something was or was not a mini trial.

The second point on----

THE PRESIDENT: There is then the next sentence.

MR THOMPSON: Yes, I accept that, but there is a question about how far beyond that goes, and the Court of Appeal in that respect made the point in the middle of 53 that the question of how high a standard to apply needs to take account of the fact that it is not a black and white question, it is not a binary question, because it is a continuing process under which a CPO may be varied or revoked at any time. In my submission, that is not disputable in itself, that is correct, but----

THE PRESIDENT: I think they are saying, are they not, quite correctly that the Tribunal applied a higher test than would be the case for a strike out application, and that was wrong.

MR THOMPSON: I agree.

THE PRESIDENT: The test should be the test as for a strike out application.

MR THOMPSON: Yes, I agree. That is a point of law.

THE PRESIDENT: It is a different test. It is a very different test, is it not?

MR THOMPSON: I accept that is a point of law. I am only looking at what they did or did not say. In relation to that point - not only the point about it is not a binary process, the point about it is a continuing process - there is also the recognition at 54 that in the end, and quite obviously we do not know what would happen if Mastercard chose not to appeal, but at para. 54 they recognise that the assessment of these matters is a question for the CAT to decide using its substantial expertise, and on this appeal going in to appeal the decision to refuse a CPO if there has been a demonstrable error of law. So the question then comes to a misdirection in relation to the expert evidence and the nature of the hearing, but they recognise that the Tribunal will retain a significant discretion even under their test.

THE PRESIDENT: Yes.

MR THOMPSON: Then, finally, at 57, on the issue of distribution, the point went to a significant degree by consent in that Mr Hoskins accepted that the rules do not require that the award should be distributed according to what each individual claimant has lost, although where that is readily calculable it is probably the most obvious and suitable method of distribution. Then at 58 they said there was a conceded misdirection. So that presumably will not be the subject matter of an appeal to the Supreme Court because Mastercard conceded it was correct.

So in summary, as we see it, the main concern seemed to be the level of scrutiny of the expert evidence and what was, in effect, what the Court of Appeal rightly or wrongly thought was a mini trial of that issue, which the Tribunal had, itself, said was inappropriate. In their various skeletons, the cartelists have raised various specific issues on pass on, data and distribution. It is obvious that we are not deciding the merits of those points here, but we say that the Tribunal needs to be realistic about the likely implications of a further appeal in *Merricks* for the present applications.

We say in relation to pass on that this is a very different type of case. The issues of pass on in *Merricks* related to the allocation of loss, the well known issue of potential conflicting claims as between direct and indirect buyers. We say there is no such issue here, at least for UKTC, which is a claim on behalf of the first acquirer of new UK trucks during the cartel period and a short run off claim, so a single claim per qualifying truck.

So far as we are concerned, the issues raised by the cartelists, and this is an issue that Dr Lilico addresses in some detail in his responsive report, concern the level of discounts achieved by purchasers or lessees as against list prices, so transaction prices, which we would submit is an entirely familiar and standard economic issue. The fact that an

independent dealership network may have been involved for many transactions is essentially irrelevant to the analysis of the relationship between list and transaction prices, and that issues of downstream pass on of the kind that was considered by the Tribunal in *Merricks*, for us at least, are for the cartelists to plead and to prove on the evidence.

So far as data is concerned, this again is a very different type of case which we have set out at para.7.4.3 of our skeleton. This is a heavily regulated industrial product where extensive commercial data clearly exists, and where individual claims are, in principle at least, individually identifiable by reference to individual regulatory and commercial documents. So it is not at all clear that the type of concerns that the Tribunal had over data in relation to 46 million owners of a Mastercard credit card would apply in relation to this type of case, whatever the test applied by the Supreme Court.

Likewise, the distribution issues that were of concern to the Tribunal are very, very different from those that arise here, and are indeed illustrated by the very straightforward method that Dr Lilico has proposed whereby individual claims would be based on annual relevant expenditure on either the purchase or lease of a new truck falling within the scope of the decision. As we have already pointed out, that issue was very largely conceded by Mastercard as a matter of law and principle, so we would say there is unlikely to be any relevant appeal on this issue anyway.

So those are the points that I wish to make in relation to *Merricks*.

THE PRESIDENT: Thank you. Can I raise one other matter for you, and indeed for all of you: if - and we have not obviously decided until we have heard from you all - we did think that it were appropriate and in the interests of justice to await the outcome of the proceedings in the Supreme Court, they, of course, only concern the suitability of the claims for collective proceedings. There is a quite distinct ground of opposition that is raised against your claim and RHA's application to do with funding. One matter that we wanted to raise is whether, even if we were of the view that the question of the suitability requirement should await the outcome of a potential appeal on *Merricks*, might there be good sense in proceeding to hear the objections to the funding - that is to say that we have a collective funding response on behalf of all respondents and then there are some more specific objections taken more against perhaps RHA based on the DBA regulations, but also against your funding agreement by DAF, that those could be heard as a distinct issue because they are not affected at all so far as we can see by any appeal in *Merricks*? That could be heard and decided and if anyone thought it appropriate they could seek to appeal it while *Merricks* was proceeding. Is there anything you want to say about that?

MR THOMPSON: I obviously understand the point, and it is a discrete point, as it is in *Merricks* itself, I think, because I think there were some funding issues floating around in that case.

THE PRESIDENT: There absolutely were, yes.

MR THOMPSON: I do not have instructions on that issue, and obviously our strong preference is to get on with the whole case. I can certainly take instructions as to whether we are content, if the Tribunal is against us on our main submission, to proceed in relation to the funding issues as a discrete point of law.

THE PRESIDENT: If you thought it would be unhelpful we would like to know that, and equally, if you thought it might be helpful, because, as I say, any potential appeal against that, whether we were in favour of you or against you, either side, of course, may seek to appeal, and there would be no reason why that appeal could not, or at least an application to appeal and, if granted, the appeal----

MR THOMPSON: Yes. I can see the specific point on DBAs, which, as you say, was initially at least primarily against the RHA, is a legally discrete point, I think I would have more reservations about the rest of the case, which might be more wound up with the substance, but I----

THE PRESIDENT: It did not seem to me, looking at the joint response submission - and indeed there is perhaps a slight clue there, it is drafted by different counsel, specialist costs counsel - to do with some of the detail of the funding agreement and the related agreement, wholly unrelated to the points in *Merricks*.

MR THOMPSON: I understand the point. Can I take instructions while Mr Flynn is speaking? He may have a more considered view on it already.

THE PRESIDENT: And it is something that we would like all of you, please, to think about.

MR THOMPSON: Yes, but obviously my primary submission is that we should press on.

THE PRESIDENT: Yes, I completely understand that.

MR THOMPSON: I am grateful.

THE PRESIDENT: Mr Flynn?

MR FLYNN: Sir, just on that point, para.19 of our skeleton argument says precisely that: if the Tribunal is against us on the points that we are about to discuss, then, yes, it would make eminent sense to press on with issues which are unaffected by what one might call the *Merricks* stay, and that would be the funding and DBAs points that have been raised by separate submission. We would be entirely in favour of that as a fall-back position, essentially for the reasons you have given. If there are going to be appeals one way or another on those points of law, we might as well get those into the system while we are

waiting for the Supreme Court. That is our position, which I hope is clearly made in the skeleton and reiterated now.

Obviously our primary position is that we are very resistant to the idea of a *Merricks* stay at all. The first point I would make which perhaps does not come across thoroughly in all the submissions you have had is that unless and until the Supreme Court says anything different, the Court of Appeal ruling in *Merricks* is the law on the matters it covers, and the Tribunal could not be criticised for conducting the June hearing accordingly. That is what it says.

The second point I would just like to emphasise from our submissions is that as of today's date the length of any stay that would be put in place by awaiting the outcome of an application to the Supreme Court, which it seems will be made, but one does not know the scope of it, it may be quite a narrow one, but the length of stay is entirely up in the air. We have done some calculations in our skeleton. It seems likely that the Supreme Court on its current timetables would not be answering the PTA application until the autumn term or Michaelmas term, or whatever they call it, and by reference to the achieved outcomes to date it could well be something approaching close to two years - this is on an average - from the date of the Court of Appeal's ruling to the Supreme Court's ruling on an appeal. That is the average of what they achieve across the range of cases that they do.

THE PRESIDENT: They are generally very conscious of whether other cases are awaiting the outcome of an appeal.

MR FLYNN: I am quite sure they are, Sir. As we have noted, this would not be a case that would fall within their normal criteria for expedition, which apply to matters of personal liberty or children or extradition, that sort of thing. It would not fall within that category, but no doubt, and I would not seek to dispute the fact that knowing that other cases were waiting they would give it a fair wind. Let us say that that would lead to an average outcome, you are talking about 22 months from the date of the Court of Appeal judgment in *Merricks*.

You would then have another period in which this case would have to be re-listed for directions, so one is talking potentially of a two and a half year delay in which these proceedings will not advance, and that period would be longer if Daimler, and possibly others of the OEMs, as we have called them to save ourselves saying 'settling cartelists' 500 times, had their way and were allowed to re-plead and supplement their evidence at that point. So one is talking about a hefty delay, a delay which as your letter, Sir, recognises,

would put the entire CPO regime on hold for that period, which is plainly a big decision with serious implications which will not be lost on the Tribunal.

We have put in our skeleton an analogy with - we looked for analogies of other areas of case law where the law moves fast, and we have put in the authorities bundle, I do not think we need to go to it because the facts are far removed from the current ones, one involving immigration where the Court of Appeal urged caution on first instance judges ordering stays pending appeal outcomes in other cases, whilst recognising of course that that might be appropriate in certain cases, but it should not be something which a court plainly does lightly, and I am not suggesting that this Tribunal would either.

Obviously there are going to be other issues which are up in the air arising in other cases, as these proceedings roll on in whichever way they go. I think the Tribunal has already identified the *Sainsbury's Mastercard* appeal in the Supreme Court as another one which might be relevant in other of the trucks cases. There are other issues which are going to arise in the competition law world, if I can put it that way, which will be relevant to this case and which will be on appeal. It could be on pass on, it could be on corporate knowledge, it could be on the proper law test, for example. There are lots of cases, and there is no hoping for any of us in our lifetimes really for these things to arrive at a steady state.

So we say that there are real dangers in waiting for the law to be settled, particularly over such a lengthy period.

The third point that I wanted to stress from the submissions in responding to what has been said against us is that there are obvious and certain harms to the Road Haulage Association and the claimants that it does and is seeking to represent if such a delay is put in place. Apart from the delay in access to justice, which I have probably already sufficiently outlined, in this specific context there are considerable risks to the collective proceedings. Those who have already signed up, it will have to be explained to them why there is a lengthy delay. They may lose confidence in the process. I do say that this is a consideration that the Tribunal should not underestimate. This is a matter that the haulage industry would find it difficult to understand. That might be music to my friends' ears, but it is bad news for redress, in my submission.

We have explained that there would be risks to the integrity of the evidence and the documentary record and memories. The facts go back a long way. That applies both ways, to both sides of the argument. We have no specific domestic limitation concerns to raise,

but the passage of time may give rise to arguments relating to limitation in relation to the foreign trucks, as we have mentioned in our skeleton.

Essentially, those, as I would say, certain harms are not balanced by equal harms to the OEMs if there is no stay. They may save some costs, but looking around the room one suggests that Parkinson's law applies here with some force. Otherwise there is no harm that they can identify to pressing on.

With all of those points, we say that the stay should only be granted if the Tribunal considers it absolutely necessary in the interests of justice. In the specific circumstances of this case, we say that it is not. RHA's application was prepared with the Tribunal's guidance and standards in the *Merricks* case law fully in mind, and is intended to be consistent with that guidance and well able to meet it. My friends prepared their responses or objections to the same standard. That may be why they are so voluminous. They have thrown everything at it.

THE PRESIDENT: As you said at the outset, we could not apply that standard.

MR FLYNN: My point is, Sir, as we have said in the skeleton, you can have comfort going forward that even if, and let us say that in due course the Supreme Court reinstates the standard that the Tribunal laid down in the *Merricks* case, that standard has been met in the application.

THE PRESIDENT: If I may interrupt you, you say that. The respondents dispute that, and we would not hear argument on that. It may be you are right, that it does meet the standard. That would have to be argued, and it will not be.

MR FLYNN: You will have seen our reply, which does address the impact of the *Merricks* judgment, as we said we would, and I do not see any surprise in that, that we have devoted a few pages to it, but the impact of the *Merricks* judgment can only go to the standard by which this volume of evidence and argument is to be addressed. As I said right at the beginning, the Tribunal could not be criticised for applying the tests laid down by the Court of Appeal, and I accept, and you are right, it is a lower test than the one the Tribunal carried out, but should it be necessary at a later stage, and this is what we have said in our skeleton, in the blurred and dynamic life of a CPO, as the Court of Appeal seems to envisage it, at a later stage to reappraise some of the material, our submission is that we have tried - yes, you will not hear argument on it at the time, if you are following the Court of Appeal test, Sir, you will no doubt close that sort of line of argument down - but if it falls to be reappraised at a later stage in the light of anything that comes from the Supreme Court, we say the material will not be found wanting.

The principal relevance of the *Merricks* Court of Appeal judgment, the importance of which we do not discount, for these proceedings is as to the standard by which our case is to be appraised. Otherwise, and I think Mr Thompson has made some of these points, *Merricks* is not actually especially relevant to our case, particularly the RHA's case. The distribution points do not arise on the RHA's bottom line methodology. The pass on issues in *Merricks*, which are completely different from those which may arise in this case, *Merricks* is not a case about indirect or direct purchasers, it is a consumer case. It is about what happens when an alleged overcharge reaches the end of the line, as it were. This is a different issue altogether, and all those issues in our submission can be and should be debated at the CPO hearing in June.

I think I would probably be straying into discussing how that hearing might be conducted if I went further, but I see the length of Dr Davis's report has been mentioned. Bearing in mind that he is responding to fully five independent expert reports, when we were actually only given to expect four, but Volvo could not resist at the end of the day, and my friends will only have to reply to those bits that concern them. They do not have to reply to the whole shooting match.

THE PRESIDENT: It is a slightly separate issue because even if the respondents say they need a bit longer then, if necessary, one can consider that as a quite separate question, should this hearing be put back to the autumn, or something like that. It certainly does not impact on what might happen in the Supreme Court. Similarly, as someone has said that, in the light of all the evidence, five days is not sufficient, it needs seven, I think. Those are separate matters.

MR FLYNN: I can address you on that if and when we come to it, but I just thought I would mention the Davis report, because, in a sense, it goes to the standard which we have sought to meet. It is a response to criticisms of the application which we put in on the basis of the *Merricks* Tribunal test, if I can put it that way.

I think probably, Sir, you have our submissions.

THE PRESIDENT: In responding, would you also address Mr Thompson's limitation concern and, if there is a concern, how it might be met if there were to be an adjournment.

MR HARRIS: I will do that, Sir. I aim to keep these reply submissions brief because of the extent to which this matter has been addressed in the written submissions, but it is plain that the *Merricks* Court of Appeal decision has had a profound effect on the scope of the collective actions and the existing materials within them. So much so, that if you turn to the RHA reply, which you are welcome to do, but I can quote, at para.13 the RHA says:

"Much of what was said by the OEMs in respect of the law governing collective proceedings ... is now incorrect and should be ignored."

So that is how, in their written reply, they have said there is a profound effect of the change in the law expressed in *Merricks* at the Court of Appeal level. Likewise, the UKTC says, and this is at their para.7, that the changes in *Merricks* Court of Appeal are "highly material to the approach to be adopted". In other words, in the written reply to both of the proposed collective representatives, the subject matter of the *Merricks* Court of Appeal, in sharp contrast to what is now said today - so before this issue arose - when they put their case in writing they said it is all central and highly material and very relevant, but we are now met today with some submissions that say it will not really make a lot of difference to the shape of things going forward. The two things are completely inconsistent.

The reason that the replies are so replete with references to *Merricks* in the Court of Appeal is precisely because it is said to be so material. I would like to show you very briefly indeed two parts, one in each, so that you get a flavour for this, and we cannot allow there to be any resiling from it. Taking UKTC's reply first, if you turn, please, to para.6 of that document.

THE PRESIDENT: Paragraph 6?

MR HARRIS: I only propose to take you to para.6. That says essentially, look at *Merricks v Mastercard* in the Court of Appeal, everything now falls to be considered in the light of its ruling, and then there are five sub-paragraphs that I invite you to cast your eye over, I do not need to read them out.

THE PRESIDENT: (After a pause) Yes.

MR HARRIS: Those are the points that are described at the top of the next page as being "highly material to the approach to be adopted and the standard to be applied", and, unsurprisingly, in the remaining 93 pages of this document each of those sub-points in 6 is then developed. That is indeed the bulk of what goes on in this reply.

In a similar theme, again without delaying the Tribunal by extensive references, if you were to turn to the RHA reply, all 106 pages of it, and pick it up at section B that begins on internal p.7, you will see the heading - for present purposes, all I need to do is identify essentially the heading - "The approach to be taken to the eligibility requirement".

Then what we have is 12 pages with sub-headings, take, for example, the first one, "The overall standard at certification". There is a foundational matter if ever I have seen one.

Over the page, towards the bottom of p.8, "Commonality", again central to CPO hearings.

The bottom of p.9, a sub-heading, "Same, similar or related", that is a further elucidation of

common issues. The top of p.13, "Suitability of the claims for resolution", this is all in the life of *Merricks* in the Court of Appeal.

I do not need to go through it all, but you will see there are 12 pages of nothing but how the landscape has changed, it is said, in the light of *Merricks* in the Court of Appeal, and how they now put their case both of the proposed representatives on the back of that changed landscape.

The next point is that it is public knowledge, and it has been publicly confirmed by Mastercard, that they are going to appeal the *Merricks* Court of Appeal judgment. If you would like it, we have available in court----

THE PRESIDENT: It has been confirmed to the Tribunal.

MR HARRIS: Yes, very good. Therefore, if permission is granted, then some truly foundational matters will be at large in that appeal. They include at least the following four items: the standard of review in a CPO hearing; number two, the approach to expert methodologies; and number three, the relevance of data availability and how it is to be assessed. They are all substantive matters, and then there is a very important fourth procedural matter, which is what is the shape of the hearing, including specifically what is the degree and scope of cross-examination and testing of the expert or experts and his or her or their methodologies? Those are truly foundational matters. It is completely false for them to be described in the RHA skeleton, or in oral submissions today in paraphrase as, and I am quoting here from the RHA skeleton at para.16(a) as "somewhat limited issues". That is, of course, not what the RHA said in its written reply. On the contrary. It is equally false for the UKTC to have described it in their skeleton argument as "any appeal being likely to be on grounds that are only indirectly relevant to the circumstances of the present case, and may indeed cast no light on the approach to be adopted in this case". Nothing could be further from the truth and, with great respect, nothing could be more obviously further from the truth because they go to these foundational matters of standard of review, approach, etc, the four that I have identified.

We then know that if there is to be any appeal accepted by the Supreme Court in *Mastercard*, it therefore must relate to these foundational matters. The only things that can be appealed by *Mastercard* are the questions of law that arose in that case. In other words, UKTC and RHA simply cannot have their cake and eat it. They cannot have, on the one hand, submissions that say this is all truly fundamental, it alters the shape of these foundational issues, this is how you now have to proceed, you can 'ignore' what the OEMs have said versus on the other hand, actually it is not a big deal at all, so you can just press

on. If it is a game changer, as they have described it, then the sensible course is for this Tribunal to wait to see if the game changes again at the Supreme Court level.

It is at best an obviously unwise use of resources to proceed on the basis of the *Merricks* Court of Appeal judgment when these foundational issues may well be revisited substantively by the Supreme Court in the near future. Indeed, as the RHA states in its skeleton argument at para.13, "It would only be if the Supreme Court overturn the Court of Appeal in a respect which was fundamental to the grant of one or more of the CPO applications in this case that a substantial amount of time and money would have been wasted". Exactly, that is precisely the prospect that faces this Tribunal for these proposed CPOs, overturning in a fundamental respect, and it is precisely for that reason that the issue is being put on the agenda for today.

I want to mention just briefly two of the cases before turning to the critical question of prejudice, which is held against the OEMs.

THE PRESIDENT: We have read your written submissions and we have looked at the replies. I need to limit you on time because you have your colleagues for the other clients, unless you have agreed between you that you are----

MR HARRIS: It has been agreed that I should proceed principally and foremost on this issue and then there will be----

THE PRESIDENT: Just brief supplementary submissions.

MR HARRIS: Precisely. There is the separate question of the fallback position should there be an adjournment in any event, so I am not going to address that now unless invited to do so.

THE PRESIDENT: No, I think that is a separate point.

MR HARRIS: Very briefly, you will have seen the *AB (Sudan)* case. It is cited by the RHA in its skeleton at 16(c). It states, and we respectfully rely upon the proposition, that in this case the Tribunal is unlikely to want to waste time and other valuable resources on an exercise that may well be pointless if conducted too soon. It refers to there being a foreseeable waste of such resources. Those are exactly our circumstances, and therefore it is quite proper for this Tribunal on the basis of that Court of Appeal authority to have regard to the question of a stay to the prospect of other valuable resources being thrown away pointlessly, particularly where, and again here I quote from that judgment at para.30, "the anticipated appellate decision will have a critical impact on the proceedings in hand." Taking simply one of the examples I gave, the standard of review, that has a potentially 'critical impact' on the way forward.

Likewise, in the question of *In Re Yates*, it was expressly said to be reasonable for a judgment to consider that it is in the public interest to await the outcome of an appeal to a higher court by reference to all the circumstances. One of those circumstances included the procedural point that I raised about how does one go about…

THE PRESIDENT: Yes.

MR HARRIS: So, for these reasons, as a matter of law and of principle, we say that the matters should be stayed pending the outcome of the further deliberation of the Supreme Court when it receives what we know will be a permission to appeal application.

Moving on then, briefly, to prejudice, the first point I do not dwell upon because it is raised in the written submissions at some length, it is wasted cost and resource. I simply emphasise the following three points: it is wasted cost and resource all round, it is not just on the part of the OEMs if there is no stay, but it also on the part of the proposed claimant representatives. It is also on the part of the Tribunal, and that has two further manifestations in the context of these particular cases. Other Tribunal users would be prejudiced if the Tribunal's resources are unnecessarily used and essentially thrown away by hearing these cases in June and then the law changes, but also there are the members of the proposed classes of prejudice, because if resources are spent by the proposed class representatives in prosecuting what are essentially wasted hearings at considerable expense, then that takes away from the potential amount of damages that would be available to those proposed members were the CPOs ever to succeed. Of course you do not have any of those members before you today, and my respectful submission is you must zealously guard the interests of those non-represented members.

Turning to some of the discrete items very briefly, there is no evidence in support of the submission that memories will fade in the relatively short amount of time in the scheme of this case were there to be a Supreme Court hearing. There is no evidence of that, and indeed it is interesting that the proposal now is for some months for determination of PTA, and if it is taken maybe up to - maybe up to - two years for the substantive appeal, but that would be subject to any representations made to the Supreme Court to ask them, please, to move forward more promptly, and yet there was a period of more than that in delay on the part of both the UKTC and the RHA in bringing their collective proceedings after the settlement decision was made public. So again, it is not as though this is the sort of delay that has not already happened by reason of other things.

So July 2016 was the date of the settlement decision, and it was just under two years for UKTC to issue and just ever so slightly under two years for the RHA, and yet they have been quite happy with that effluxion of time.

In the skeletons it is suggested that some documents may somehow - not nefariously - go missing. It is an aspect of fading memories. Again, there is no evidence of that, and these are already very historic claims. So there is no suggestion that a limited amount of further delay will make a material difference to the just general disappearance of documents with the passage of time. If that were a real concern, then of course there could be further publicity provided by both UKTC and the RHA if they genuinely thought that that was a concern.

The next one to which I am replying is in the skeleton where they raise the delayed receipt of monies. Of course, that is a non-point, because they are already claiming interest, either simple or compound. So the time cost of money will be compensated if they succeed.

There is a curious point that was indeed elaborated upon in the oral submissions about loss of confidence in the process and/or having to tell the proposed members that there might be a delay. The latter one for the life of me, with great respect, I cannot understand. How does a proposed member lose confidence in his proposed representative if his proposed representative tells him that there might be a delay. It does not make any sense.

As for loss of confidence in the process as a whole, again I really struggle with this one. Surely there would be a greater loss of confidence if there were to be proceedings in June on a legally erroneous basis very potentially with great wasted expense and a subsequent appeal leading to even further expense and then more appeals. It seems to me, with respect, that that is the greater evil.

There is a point that was not raised in oral submissions, but is in writing, to which I reply, which is the so-called churn rate. It is said that there have been several, I think, thousand people who may have "given up their operating licence", but there is no evidence as to what that means. Does it mean they simply change their name so they get a different licence? Perhaps they change their vehicle. One does not know. One cannot give any weight to an unspecified and unevidenced allegation of something called 'churn rate'. In any event, even if, somehow, one were to take this as being these people disappearing, though that is not what it says, there is nothing to prevent a company that has disappeared from bringing a claim, and indeed I believe, I cannot remember, was it Charlwood, the one that we were talking about before?

THE PRESIDENT: The company that wrote the letter?

MR HARRIS: Yes, signed his name to, I apprehend----

THE PRESIDENT: Charthire.

MR HARRIS: Charthire, it sounds like they may have gone out of business and they are still proposing to bring their claim, albeit by an assignee. So there seems to be nothing in that point.

Limitation is the next one, and I address this briefly. We do not understand there to be any material limitation prejudice. We are already two years beyond the date of the settlement decision as regards claims in the Tribunal, so nothing alters in that respect when it comes to any delay that there might be by reason of a stay. Then, if we are talking about individual claimants beneath, if you like, or underlying the proposed collective proceedings, then on the dates that were ventilated by you, Sir, with in particular Mr Thompson, it does not look at all likely that even with a stay that would take the underlying individual claimants beyond six years from the date of the July 2016 settlement decision.

THE PRESIDENT: The limitation period might not run from the date of the decision. It might be an earlier date when a potential claimant could reasonably have grounds to start their claim or make a press release about a statement of objections, or something.

MR HARRIS: It might do, and we are familiar with those arguments, but that is a position they already face. If there is a danger of a time period running out on any day, tomorrow or the next day, because of an earlier set of dates, that is a 'danger' that they face today, yesterday, tomorrow, and it arises wholly irrespective of any stay.

THE PRESIDENT: On the other point about whether it might be said that claimants opting in, their limitation runs from the date they opt in, is that a point that you take?

MR HARRIS: It is not a point that we currently take and I confess, I do not understand the point. It was not----

THE PRESIDENT: You say you do not currently take it. I am sure it would give comfort if you say, "We undertake that we will not take it, we have not taken it yet and we do not intend to take it." What I think is being said is if somebody opts in more than two years after the decision, which is now----

MR HARRIS: What I can say, Sir, is that----

THE PRESIDENT: I think that is the point.

MR HARRIS: -- were there to be a substantive limitation point that concerns the Tribunal - say, for example, the one raised by Mr Flynn about very speculatively some foreign law limitation point, then we are very willing to take instructions so as to obtain undertakings that we, Daimler, would not rely upon the additional effluxion of time for the period of a

stay in respect of that limitation point. The problem we have got at the moment is we do not understand any genuine limitation point. If one can be put to us we will consider it, and as regards the one that was raised by Mr Flynn, foreign limitation periods, we are at somewhat of a disadvantage because we have been pressing for a long time so we can seek to understand precisely how many trucks that there are for these two claims as opposed to some of the individual trucks actions that are from overseas. We are still not at the end of that road. We have got some updates right at the back of one of these bundles for today, and they do not look, speaking just for myself after a quick review, to be large and material numbers, but it has not yet been decided whether or not there are foreign applicable laws, and therefore it has not yet been decided whether there are foreign applicable law limitation periods.

Again, the same point applies. If a genuine point can be put to us, or the Tribunal isolates and is concerned about that, then we will obtain instructions to provide undertakings to the Tribunal not to take, if you like, the incremental period for those limitation points by reason of any stay.

THE PRESIDENT: I think that has been raised regarding potential claims in the High Court, which I do understand now. If you are able to take instructions I think it is any additional effluxion of time over the period of a stay as regards claims by members of the class as defined.

MR HARRIS: Yes.

THE PRESIDENT: One need not get into the details of whether there are any limitation defences or not, and there may well not be, in which case there is no meat in the undertaking and you lose nothing.

MR HARRIS: Exactly. I will follow up on that one while my learned friends make any supplemental submissions, but I am confident that we can reach a satisfactory resolution on that.

Then there is very little else to say on prejudice, but just to pick up, for the sake of completeness, what is said in the skeleton argument and, to some extent, Mr Flynn this afternoon, was that it was said in the skeleton and orally that this will effectively put a stop to all other CPOs. We do not, with respect, agree to that. There are other issues in other CPOs that could go ahead, but it is no difficulty for this Tribunal to say that since these are truly foundational matters regarding the standard of review, then if there is to be a stay in this case it would not be remotely surprising if the same rationale applies to other cases. Of course, as at today there is only one other case, so it is not as though one would be staying

20 or so other cases, and then there is a minor point put about removing the attractiveness or reducing the attractiveness of England as a litigation forum, but that is neither here nor there.

That leaves only one final point, subject to firming up on the undertakings and addressing you, should the need arise, on why there should be an adjournment of the June hearing in any event, so, if you like, timetabling, and that is the length of any delay. What we have seen----

THE PRESIDENT: The other point is proceeding with funding.

MR HARRIS: I beg your pardon, and proceeding with funding, so there are two points, and I will take them extremely quickly. Mr Flynn's skeleton argument talks about it taking 12 weeks from the date of lodging of a PTA to giving a decision on average, and by my reckoning that takes us from the deadline of 14 May for *Mastercard*, which is only next week, assuming they do not do it early, to the beginning of August. If you ignore non-term periods it takes you to mid-September. So on a 12 week period, that would give rise to a decision in mid-September, and there is nothing to prevent either these proposed applicants writing to the Supreme Court or, perhaps even more pertinently, Sir, members of the Tribunal, there is absolutely nothing to prevent this Tribunal writing to the Supreme Court and explaining the position and the potential hold up to this and other cases and expressing a desire to see a prompt course of action taken.

There is a little bit of scaremongering here about the amount of delay that would have to appear in any event and, though I am not going to develop these points, were there to have to be an adjournment in any event that takes us into exactly the same period in the autumn. So, in those senses, there would not be any delay at all.

Lastly, we are opposed - I speak obviously on behalf of Daimler, and will let others make their position clear - to a splitting off of issues from a CPO hearing in the same way that did not find favour in *Merricks*. We had funding and other issues together. The same should happen here. The principal reason for that, we submit, is that this is an overall exercise of discretion on the part of the Tribunal on the balance by reference to all the factors when considering both whether or not it is just and reasonable to have in these cases either UKTC or the RHA as the representative, and, on the other hand, the so-called eligibility requirement, including things like common issues, costs benefit analysis, and what have you. They do not split, in our respectful submission, into nice, neat and separately divisible areas. They all go into the question of the Tribunal's discretion. So we are opposed to

splitting off, we think it is better for them all to proceed together in just the same way as they have in the previous CPO hearings.

That having been said, if you are against me on that submission, we do see that there is a potentially a severable issue of law on the DBA question, but I will leave others to make that submission because it is not a point that Daimler makes. That is almost like a preliminary issue which is a slightly different point.

So, unless I can assist further, those are our submissions.

THE PRESIDENT: Yes. Mr Beard?

MR BEARD: Sir, I will mainly adopt the submissions of Mr Harris in this regard.

THE PRESIDENT: Just to make it clear for everyone, Mr Beard, I think you represent DAF?

MR BEARD: I do.

THE PRESIDENT: It is just helpful with the number of counsel here.

MR BEARD: Yes, I do represent DAF today. In relation to *Merricks*, we have set out in our skeleton why it is we say that there is a series of important issues, in particular at para.3 - as Mr Harris has already articulated, standard of review, tests for data availability, what are common issues, how should the process be followed in order to enable a fair assessment, and indeed the extent to which consideration of a compensatory nature of damages may be relevant as well.

Mr Flynn earlier said, "Ah, well, one can wait in perpetuity as cases come through in relation to competition law matters in circumstances where the law is constantly being developed". Let us be realistic here, what we have in *Merricks* is only the second case under the CPO regime, a novel scheme in English law. Clearly the situation is that the Supreme Court will scrutinise these matters if permission is granted. That will be of benefit to the regime as a whole, including these proceedings, by helping us with matters such as legal threshold and process, approach to evidence, and so on. So, of course, yes, there may be a delay in this case, but that may simply be an incident of this being one of the early cases under a new and novel regime, where it was inevitable at some point that higher court scrutiny was going to occur.

So we say, as Mr Harris has done, that plainly it is sensible to adjourn the CPO hearing awaiting the outcome either of a determination of no permission or permission and then the judgment of the Supreme Court. We do not, with respect, really understand how it is that either UKTC or RHA intend this Tribunal to proceed in terms of the legal test, relevant approach, timetabling, and so on, if we do not do that, because we do not understand how

we can deal with these two tests, these two approaches, these different approaches being managed.

THE PRESIDENT: We would proceed on the Court of Appeal's----

MR BEARD: I understand, but obviously if we did that then there is a real risk that in those circumstances we would all be back here again dealing with these after the Supreme Court. Mr Flynn in his submissions talks about not worrying because all that one will want to be doing is looking at a variation or possible revocation if a CPO has been granted. We say, no, you will be looking again wholly at the way that a CPO can be approached on a different test, potentially a different process, whether or not the same judge or panel can deal with these things would need to be considered, and of course there will have been waste of time and resources in dealing with these matters twice. Indeed, questions of the fairness of such a process do arise. The deprecation of any prejudice to the respondents in these appeals is something that should not be overlooked. Clearly, there would be serious prejudice to them, as Mr Harris has articulated.

On the other side, it should be said that the prejudice to the claimants, as Mr Harris has articulated, has been somewhat overdone given the passage of time in relation to this case and what underlies it. Indeed, it is worth bearing in mind when complaints are made about preservation of documents, and so on, that of course this case follows on from a detailed investigation where there was an extensive gathering of documents and preservation of documents much earlier than might otherwise have been the case in such litigation.

Mr Harris has dealt with the *AB (Sudan)* case. It does not add anything. I can deal with it in more detail if you wish, but it really is not helpful.

As to the other matters, in relation to limitation Mr Harris has rightly pointed out that it is difficult to understand why the two years in question change the position in relation to limitation so far as this Tribunal is concerned. In relation to your point, Sir, about the position on limitation on opt ins, given that we are now past two years from the date of decision, either that point exists or it does not. It does not change anything.

So far as the position in relation to the High Court is concerned, we will take instructions in relation to the point raised, but it is to be stressed that if this is the real concern obviously we want to know what is being asked of us in terms of an undertaking. None has been asked of us to date, and we are concerned that no undertaking we give should indirectly provide any sort of expansion of the scope of claims that can be brought before this Tribunal, or indeed before the High Court in relation to any of these matters. So we will

take instructions, but the precise nature of any undertaking I think we will need to take away and consider in a little more detail.

THE PRESIDENT: We want to deal with this today.

MR BEARD: I will take instructions of course.

THE PRESIDENT: As I understand it, and I appreciate it may only have emerged in the course of this hearing where there was some clarification of what the concern was, you will not rely on any additional effluxion of time over the period of a stay in support of any limitation defence against members of the class as defined.

MR BEARD: In relation to the High Court proceedings.

THE PRESIDENT: In relation to the High Court proceedings. Well, in any proceedings, whether it is in this Tribunal or in the High Court, although as you say in this Tribunal it is hard to see that it is going to make any difference.

MR BEARD: Sir, in those circumstances, we do need to take those matters away, because what we cannot have is a situation where, for instance, one could spend two years gathering people towards claims that would not otherwise be covered by them - for example, in relation to opt in matters. That would not be appropriate and we say that in those circumstances we do have concerns in relation to that, but I will take instructions in relation to that matter.

That is in relation to limitation. The only further matter that is raised is in relation to the possibility of dealing with costs and funding matters. Mr Harris has already canvassed the key point in relation to this. One can deal with it, if one wishes, by referring to the joint submissions on funding and costs, but what one can see from those, as Mr Harris has already set out, is that those issues concerned with funding and costs issues go to a range of overlapping matters concerned with suitability of the representatives, the manner in which funding relates to particular issues, matters which will, of course, be dealt with in considering the certification issues substantively, and, as Mr Harris rightly says, those are considerations that go to the Tribunal's discretion in relation to the suitability of a case for certification, and in those circumstances should be considered in the round along with the other issues that are highlighted concerning, for instance, issues of conflicts of interest or the appropriateness of a special purpose vehicle.

We accept that the point in relation to DBAs that I should emphasise is taken in relation to both UKTC and in relation to RHA is different in the sense that it is a statutory interpretation issue. Although it will go to whether or not certification could be granted, it might be seen as more of a bright line legal issue. That we well understand. In

circumstances where we say that it would be right properly to deal with all of those funding matters alongside the remainder of issues concerned with the question of certification, we do not see the sense in dealing with the DBA matters entirely independently.

THE PRESIDENT: Can you help me: where in the costs, you say it is bound up with the other issues. If one looks at your combined response to the costs and funding, which is in the Daimler bundle----

MR BEARD: I have got it in tab 6 in the Daimler bundle.

THE PRESIDENT: We have got two Daimler bundles. It is tab 5 in our confidential bundle, although this is not confidential. Where does that really impinge on matters that will be canvassed in an appeal to the Supreme Court?

MR BEARD: No, I am sorry, I did not say in relation to matters going to the appeal in the Supreme Court. I said in relation to the consideration of the certification of a class action, these are factors going to suitability. In relation to that we say that consideration of these factors alongside the other substantive factors that will be dealt with in relation to the suitability of certification is plainly the appropriate way forward. What we have, as you can see in those submissions, are objections to the structure and indeed the level of funding that is being put forward in relation to these matters. We envisage that, in considering those issues of lack of funding and the way in which these arguments are being put forward by all of the respondents, one will want to look at how the actions are going to proceed, what the nature of those actions is, which will of course be part and parcel of the consideration of the appropriateness of certification, for instance in relation to what sort of data is going to be gathered, how matters are going to be dealt with, what the sort of process is that is going to be followed. The Tribunal is going to be looking at how the CPO might be made and then proceed, and whether or not the funding that has been put in place is going to be adequate for that purpose. That is why you will be looking at those matters in the round in considering your discretion on suitability of certification.

THE PRESIDENT: Certainly the experience of *Merricks* is that they are wholly distinct issues----

MR BEARD: I completely accept that.

THE PRESIDENT: -- and indeed were decided in different ways.

MR BEARD: I completely see that in *Merricks* there was much clearer bifurcation. What we say here is that in relation to these matters they do go to the overall consideration of suitability. They will be, we say, likely to be contingent on the consideration of the other issues relating to the structure of the class actions, and in those circumstances we see the sense of dealing

with all of those issues together, which, of course, has been the intention of all of the parties to date in relation to these matters.

If the court is minded to hive off funding issues, including the matters that are raised in relation to these joint responses, then I think what we need to do is consider how those matters are going to be dealt with and when, and I think it would be necessary for there to be a short adjournment from the hearing in June in order for all of those matters to be dealt with.

THE PRESIDENT: Why?

MR BEARD: Well, in order for these issues, certainly from our point of view in relation to DBA and indeed in relation to certain of the funding matters we would want to raise, DAF would want to secure separate representation in relation to those matters. Furthermore, if----

THE PRESIDENT: We got the impression from this - do not know if that is right - that Mr Bacon was making submissions for all the respondents.

MR BEARD: He will in relation to these matters, absolutely.

THE PRESIDENT: So you have separate representation.

MR BEARD: We have in relation to Mr Bacon but not in relation to DBA issues.

THE PRESIDENT: But you were preparing on the basis that DBA issues would be argued in June.

MR BEARD: Yes, we were. Unfortunately, the reason for my attendance today is that the leader who was going to be dealing with those is unable now to be able to deal with these matters.

THE PRESIDENT: That is not a reason for adjourning it.

MR BEARD: Sir, in relation to these issues, we would say we recognise that the DBA issue is different. We see the costs and funding issues as inter-related with others and going to your overall discretion, and in those circumstances we think that much the better and most efficient course is going to be for these matters to be dealt with in one place.

One point that will inevitably be raised is whether or not in relation to the funding issues, as I say, the parties have relevant funding to obtain documents and data. As I say, it is those sorts of data obtaining issues that may be germane both to your consideration of the substantive certification issues but may also go to questions of funding, which is why one has a degree of inter-relation.

Unless I can assist you further, Sir, regarding those matters, that is our position in relation to costs and separate issues.

THE PRESIDENT: Thank you. Who is next - Mr Jowell?

MR JOWELL: Very briefly, we gratefully adopt the submissions of Mr Beard and Mr Harris on the principal issue.

THE PRESIDENT: You appear on behalf of MAN?

MR JOWELL: I am here on behalf of MAN, indeed. We do say with them that the *Merricks* judgment sets the ground rules for what is a new regime, and the Court of Appeal judgment profoundly affects both the substantive test for certification, and also the proper procedure to be adopted, and there is simply no getting away from that. It potentially permeates into a number of nooks and crannies which may not be immediately apparent. For example, one of the issues that we have raised is the question of whether there can be double certification of two representatives, and we say that the Tribunal must choose, or alternatively should choose, between UKTC and RHA. Similarly, the Tribunal will have to determine, and this is not disputed, whether UKTC if it goes ahead is on an opt in or an opt out basis. It is not difficult to see that the Court of Appeal's judgment is likely to affect also the approach to those issues - the question of which of the two representatives to choose, and also what type of procedure to adopt, whether to go for opt in or opt out.

It is all very well saying that one can change things later on if it turns out that the Supreme Court overturns the Court of Appeal's judgment, but it is going to be very difficult to unscramble the egg in the event that a different representative has been chosen, or a different type of action has been adopted than might have been adopted had a different test been applicable. So we say it is eminently sensible in these circumstances to wait until the legal position is clarified.

That is all I had to add in relation to the main issue. In relation to the question of limitation, we say that there are really two distinct points here. One is the question of a limitation defence in these proceedings, in these CPO proceedings, that would not otherwise arise had there not been a stay. In relation to that, we do have instructions, if asked, to provide an undertaking that we will not take a limitation point in these proceedings which would arise effectively occasioned by, caused by, the additional time resulting from the stay.

THE PRESIDENT: Yes.

MR JOWELL: That is subject to hammering out the precise wording on that.

In relation to other claims in the High Court, we respectfully submit that that is going a bit too far, because it is always the case that, if somebody is waiting for a CPO application, it might be the case that they will be time-barred if they have not brought a claim in the High Court in due time. The answer to that is that you should write to your prospective defendant and seek a tolling agreement pending the resolution of a CPO or, if they do not agree to that,

to issue proceedings and then seek a stay from the High Court. That is the position now. That really should not, in our submission, be affected by these proceedings. So we say that the limitation assurance or undertaking should be limited to these proceedings.

So that is the question on limitation. I really have nothing to add further on the question of whether the costs' position could be determined in the time available. Certainly it is the case that, potentially, at least theoretically, the DBA point could be.

We adopt the submissions that have already been made in relation to the potentially overlapping nature of the submissions on costs and on the substantive matters. To give one example where it might arise, RHA has said in their most recent reply that they do perhaps envisage pass on being certified as a common issue, and they have floated the idea of test cases. That, of course, will have funding implications itself which will then have to be considered really conjointly with that suggestion, or at the very least they are inter-related. That is all that I have to say, Sir.

THE PRESIDENT: Thank you very much. Ms Bacon?

MS BACON: Sir, I appear for Iveco, and I gratefully adopt the submissions of Mr Harris, Mr Beard and Mr Jowell, so I have got only a few points to add. On the general question of adjournment and the unscrambling of the egg, as Mr Jowell put it, the egg is going to be scrambled for several reasons, and one that has not been raised today is what happens if the CPO applications go ahead and if one or both of them are certified. Let us say that happens towards the end of this year on the basis of the lower bar as set by the Court of Appeal. What happens then? I cannot imagine that UKTC and RHA are then going to be content for everyone to sit around and do absolutely nothing until the Supreme Court gives its ruling. Quite the contrary, and particularly if the Supreme Court has on that basis not been asked to 'hurry up' by anybody, UKTC and RHA are most likely to be urging the Tribunal to take at least preliminary steps. Those could involve, for example, listing preliminary issues hearings or providing for disclosure, much in the same way as has been happening in the individual actions. So we could be in a position where a vast amount of work is done, potentially over a period of a year or more, before the Supreme Court gives judgment, and these proceedings could be well down the way to preparing for trials in due course.

What then happens if the Supreme Court gives judgment effectively reinstating the approach set by this Tribunal? It would then be a complete farce because everything would then have to come to a grinding halt and we would then have to go back to the very first step of reinstating the CPO applications hearing to decide whether anything could go ahead at all.

So it is not just a question of the significant wastage of time and money in hearing the case, but also the steps that are likely to be taken after that if, on the basis of a lower standard, either or both of the CPOs is certified.

That is the only point I wanted to add on the main question.

On the two other questions, limitation: like Mr Jowell, I do have instructions to offer some kind of undertaking, but we do need to take further instructions as to how that is worded. We also, like Mr Jowell and Mr Beard, do not want to be in the position of providing for some of the potential claims to be in a better case than they would have otherwise been. There are a number of difficult issues. Class definition is one that we have seen exemplified this afternoon in the discussion at the start of the hearing. Another issue is the question of whether groups are within or without the RHA's class definition relating to groups that may be multinational with an entity in the UK. Groups may change over time, and we would not want potential claimants to be in a better position as a result of any undertaking given. So we would also respectfully ask for time to take instructions once a proposed undertaking is put to us.

Finally, on the question of the funding hive-off, I do not have any further submissions to add to those that have already been made. Like those who have spoken before, we consider, and our position is that there should be a global assessment of all of the issues that need to be taken into consideration. It is not binary, or not necessarily binary, in relation to individual issues. We accept that in *Merricks* the Tribunal was able to decide the issues in different ways, but it could be, for example, that the Tribunal comes to a view that while it might not have taken a particular view on one of the issues raised, that, combined with some of the other objections, was sufficient to deny certification, and that would be a very difficult approach to take if funding were to be hived off from the other issues at this stage. Beyond that, I have nothing to add on that. Those are my submissions on behalf of Iveco.

THE PRESIDENT: Yes, thank you.

MISS ABRAM: Sir, I am for Volvo/Renault, and I will just make three short points, if I may.

THE PRESIDENT: You are not actually a respondent, I think it is right to say.

MISS ABRAM: We are not a respondent, we are objectors to both applications. Three points: the first in relation to the effect of *Merricks* and the adjournment issue. As the Tribunal will have seen, the specific points that we expressly advance in our objections to the CPO applications are not affected by the Court of Appeal's judgment in *Merricks*, and for that reason we are neutral on the question of whether or not there should be an adjournment.

THE PRESIDENT: Yes.

MISS ABRAM: The second point is more neutrality. In relation to the question of whether, if there is a general adjournment of the non-funding issues, of the suitability issues, the funding issues and the DBA issues should nevertheless be heard in June, we are neutral on that question.

THE PRESIDENT: They do not affect you.

MISS ABRAM: They do not affect us because we are not party to the objection, and we have not expressly put forward the DBA issue.

In relation to the limitation question, the undertakings issue, I gratefully adopt and reiterate the submissions made by Mr Beard for DAF. Like DAF, Volvo would need an opportunity to take instructions and consider that question, and I am not able to offer any undertaking today.

THE PRESIDENT: I am not sure it affects you either, does it, because there is no claim against you.

MISS ABRAM: Certainly, at the present time there is no claim against us.

THE PRESIDENT: I do not think there is any suggestion that the CPOs might be amended to bring in Volvo. That would have been considered at the outset.

MISS ABRAM: I am very grateful to hear it.

THE PRESIDENT: I say there has not been any suggestion. I obviously do not speak for either applicant, but it would be rather strange - having decided which of the settling OEMs they wish to claim against, and clearly having chosen to claim against some, not others, no doubt after careful thought - if at this stage they were to seek to amend. So it seems to me that it is not an issue for you to address at this time. That is all I can say.

MISS ABRAM: I am very grateful for that.

THE PRESIDENT: Mr Thompson and Mr Flynn, I think you have a right briefly to reply, and then we will withdraw to consider the position.

MR THOMPSON: Yes, if I could just make a few short points. Mr Harris referred to references that we and the RHA had made to the Court of Appeal judgment in *Merricks*. In my submission, that is a confused submission. There can be no objection to us putting our case on the law as it stands. The question is whether there should be a stay on the basis that the law might change again, and one can consider that by reference to the possibility that *Mastercard* might have won in the Court of Appeal, so the law had not changed. It would be somewhat bizarre to suggest that the cartelists could have said there should be a stay, even though the law had not changed, on the basis that the silver-tongued Mr Harris might succeed in the Supreme Court, having failed in front of the Tribunal and in front of the

Court of Appeal. The position is really no different here just because *Merricks* succeeded to some limited extent in the Court of Appeal. As Mr Flynn said, this case has to be decided on the law. That also deals with Ms Bacon's point, because if the case is decided on the law, it does not matter that the law changes afterwards.

Secondly, Mr Harris suggested that there were four issues, but as I think I tried to indicate, there is really only one issue of law, which is what is the standard to be applied? Is it the same or different to that in summary judgment.

The other issues are matters of practice, and, in fact, there was no dispute. It was a finding of the Tribunal itself that a mini trial is not appropriate, and the Court of Appeal gave effective guidance as to what it thought that implied in terms of the handling of expert evidence. In my submission, that is quintessentially a matter for the Court of Appeal to consider, rather than the Supreme Court to have another go and say, "Oh, no, practice requires something different".

Thirdly, it is far from unknown for a court or Tribunal to rule on an alternative standard. So there is no reason why the Tribunal could not either find that we succeed either way, or that we succeeded on the basis of the Court of Appeal test, but to consider what the position would have been if a summary judgment standard is too low. One finds that in judgments all the time, "If I am wrong on this issue, I find such and such, or if such and such is appealed".

Turning to the implications and prejudice----

THE PRESIDENT: Just on that, presumably if we grant certification, as you say we should, the next step is we fix a date under the rules by which people have to opt in, if it is an opt in, or opt out. That is what follows, is it not?

MR THOMPSON: Yes, but you could consider what the implications were when you knew more and when you knew actually what *Mastercard* was or was not doing, and whether or not we would succeed on either basis, or that we would only succeed on the basis of the Court of Appeal's ruling. That would be a matter that the Tribunal could consider at a later stage if it wanted to do that.

So far as the implications for our clients or Mr Flynn's clients are concerned, we accept that there is a risk of loss of confidence, or indeed we submit it, or of small businesses going out of business or not pursuing their claims. That is obviously less of an issue for an opt out, but it would be a significant issue in relation to an opt in, or possibly for individual claims in the High Court, and we obviously took no comfort at all from Mr Jowell's suggestion

that thousands of little businesses should enter into tolling arrangements with these defendants.

Likewise, although I think some sort of assurance was available in relation to issues of foreign law, and possibly in relation to High Court limitation, the general response, although it may not be relevant specifically to this issue, does aggravate our general concern about limitation, because our broader concern is whether the cartelists accept that follow on claims by all members of the UKTC proposed class have been brought by these collective proceedings whether or not an opt out order is made. So, for example, do they accept that all members of the proposed class have impliedly at least made their claims already, even if an opt in order is ultimately made, and that is obviously a very important question, and at the moment we are not hearing much from the cartelists about whether they are prepared to give that assurance.

So far as the question of funding is concerned, perhaps ironically we seem to be in much the same sort of boat as DAF, although we have no particular sympathy for their representation issue. Otherwise, it seems to us that the question of DBAs is a discrete legal question that could be considered on its own, whether or not that is a good idea. The other issues seem to us to be rolled up with the overall merits of the case, and that it would be better to hear them all in the round in deciding whether our claim or Mr Flynn's claim, or both, should be allowed to proceed. So it seems to us that the wider funding issues, it would be better to hear them all at once, and we say it would be better for them all to be heard in early June.

I think I have already made the point about our concern about SMEs possibly going out of business as a result of delay while this matter is unresolved, and that is obviously an important question, and I think Mr Flynn has already raised it as well.

So those are our submissions, unless there is anything else that the Tribunal would like me to address.

THE PRESIDENT: Yes, thank you. Mr Flynn?

MR FLYNN: Sir, I will not repeat anything I said earlier. I did not recognise all the submissions that Mr Harris particularly was aiming his shots at. Let me just make a few possibly rather disjointed points. The first is that Mr Harris said this is what the *Merricks* appeal will be about. Well, he does not know what the appeal will be about. He knows what the judgment says. He does not know how narrow any permission to appeal application that Mastercard will submit may be, and we have given a couple of indications that there are points in the judgment which were effectively conceded by Mastercard, and therefore are unlikely to go much further.

The situation in the *AB (Sudan)* case which we have referred to is, of course, a regular situation where a court is considering a stay in the light of an imminent, supposedly, judgment where it knows what the subject matter of the appeal is, and it knows that this ought to cast some light on the issues before it. Here we just do not know what will be in the *Mastercard* appeal.

On the unscrambling the eggs point conversely, and I think Mr Harris did say this, it is likely that anything the Tribunal does in respect of these applications will, itself, be subject to appeal, and will be going further. So, if anyone has the ability to take it further I know is, to some extent, a vexed issue.

Mr Harris gave his view on how likely it was that it might be difficult to explain matters to the bodies that my client represents and his does not. The point that we make on the churn rate, a specific point that is relevant to these proceedings, is that when people hand in their licences and go out of business - that may not be every person who hands in their licence - they become hard to contact. So potential members of our claim will be eroded over time, and that is a concern which, in my submission, the Tribunal should weigh in the balance.

A point of detail, but we do explain the Supreme Court's timing quite carefully, and their aspiration for dealing with applications for permission to appeal is 12 sitting weeks from having all the relevant papers in front of them, so you cannot measure it from the date by which Mastercard must lodge its appeal.

Just a couple of points on the fall-back alternative position, Sir, we think that the funding issues and the DBAs can be heard together. That is how they have been addressed in separate submissions by separate counsel in our case, as you noticed, and----

THE PRESIDENT: The objections to your funding issue are phrased, apart from the DBA point, quite separately from the objections to the UKTC funding issue.

MR FLYNN: Yes, they are separate issues.

THE PRESIDENT: They concern the detail of the premium, the party insured, and so on.

MR FLYNN: And whether the funder has excessive control over proceeding.

THE PRESIDENT: Yes, they are very much RHA issues, they do not impinge on UKTC.

MR FLYNN: Not directly. They could be heard separately and we say that if the Tribunal is minded to adjourn there is a week set aside and that is when it should be done.

We would consider also, and I think this has been raised by a couple of my friends, the legal point really on the extent of the Tribunal's powers or ability to choose between one or two collective proceedings orders is also suitable for separate determination, and I did not

understand Mr Jowell's point that the *Merricks* appeal might have any bearing on that issue at all. So that is----

THE PRESIDENT: That might be a bit different, Mr Flynn, because that might be entirely academic if we decided possibly not to certify on its own merits but to certify the other, in which case the choice does not arise.

MR FLYNN: Of course, one can approach it both ways. You might end up with a position where you think, in principle, there are two, and then someone is going to no doubt be telling you, well, you have got to choose. You can do it the other way round so that you will know, when you come to appraise, that if one of them does not make it then, of course, the question is answered for you, but if, in your view, they both make it, you will know what the position is as to your responsibilities. That could also be addressed in the week set aside, in our submission.

Unless I can help you further, Sir?

THE PRESIDENT: No, thank you very much. We will withdraw to consider the position.

(Short break)

THE PRESIDENT: We have considered very carefully the submissions addressed to us, both in writing and orally. We appreciate the desire of the potential class representatives to progress these cases as quickly as possible, a desire which this Tribunal fully shares. For reasons that we will set out in a written judgment more fully, we think that the likely grounds of appeal that are sought to be pursued before the Supreme Court are so fundamental to the tests that we have to apply, and therefore the procedure that we have to follow in determining a CPO application, that it would be wrong to proceed while the matter is pending before the Supreme Court, having regard to what is sensible and proportionate for all concerned, including potential class members, respondents, this Tribunal and other litigants before the Tribunal.

We have reached that view on the basis that, as we understand it, the respondents are prepared to offer undertakings that they will not rely on the effluxion of time caused by this adjournment to the disadvantage of any claimant before this Tribunal, including claimants who may be members of the CPO class, and we ask each respondent to prepare undertakings by the end of Friday. We do not extend that to claims that may be brought elsewhere. It concerns purely claims in this Tribunal.

No one knows whether the application which we have been told will be made by Mastercard for permission to appeal to the Supreme Court will be granted. We would want to fix a period in December when these applications could be heard if permission to appeal

is refused by the Supreme Court. We would suggest that six days should now be allocated for that hearing, that then to be vacated if permission to appeal is granted, so that time is not lost while waiting for that decision of the Supreme Court.

We think that, as days have been reserved in June for the hearing, it would be sensible for preliminary issues to be heard, first, as regards any questions concerning the DBA Regulations that have been raised by the respondents; and secondly, as regards the costs and funding objections set out in their responses, certainly as regards the RHA - that is to say the objections that are set out in part 2 of the joint costs and funding responses. We will give UKTC until 4 pm on Friday to consider whether, on reflection, the objections in part 1 of the costs and funding responses should also be heard, in which case that will be included. We think it embraces discrete matters which can usefully be determined, and indeed if whichever side is unsuccessful sought to appeal, then that process is not held up.

So the preliminary issue will essentially be, and the wording may need to be considered and refined, whether any aspect of the funding arrangements in the application for the CPO means that the proposed class representative should not be authorised pursuant to s.47B of the Competition Act 1998.

We do not think that the question of whether there can be two parallel CPOs is suitable for preliminary determination. It seems to us that may be very much bound up with the substance of these claims and how the classes are defined, which should therefore be considered together with the eligibility of the claims for a CPO.

As I say, we will produce a written judgment explaining our reasons for the conclusion that the main applications should be adjourned.

So in the light of that, it may depend on what decision is taken by UKTC as representative with regard to how long is needed now for a hearing in June. We do not see it can possibly be five days. We saw that in a compressed timetable if everything were to be heard in June, funding was confined to, on one view, one day, on another view a day and a half. I would have thought two days would be sensible but perhaps we should keep a third day in reserve, and it might be sensible to start that hearing on the Tuesday. Obviously everybody has got these days in their calendar.

As regards the form of that hearing, given that it is a more confined hearing, I am not sure whether we need to give any further directions at the moment. For a start, it will depend on the degree of subject matter that is considered, whether it is only the RHA or also UKTC. The points are quite detailed and specific concerning the agreements and the priorities, and

so forth, so they will no doubt have to be heard in sequence. I would ask the parties to put their heads together to come up with a sensible timetable for the costs and funding hearing. I do not think that anything now, but I will be corrected if that is wrong, in the costs and funding agreements, which obviously will have to be looked at, is classed as confidential any more, but please tell me if that is not right.

MR FLYNN: That is correct from our perspective, Sir, I am not sure it is correct from the UKTC perspective.

MR THOMPSON: Yes, I believe there are two small redactions, but I cannot now remember what they are.

THE PRESIDENT: They are not substantial redactions that give rise to problems?

MR THOMPSON: I do not think so. If that is an issue then obviously we need to address it. So far as the point put to me is concerned, I think we obviously would want to be heard in relation to the DBA issue, and I will take instructions.

THE PRESIDENT: The DBA issue, that is decided now, that will be heard.

MR THOMPSON: I think it is primarily directed at RHA, but I think it is also directed and so obviously we would want to be heard on that.

THE PRESIDENT: I think it is directed at you now as well.

MR THOMPSON: Yes. In terms of the other issues, I will take instructions and write to the Tribunal as soon as possible.

THE PRESIDENT: Yes, the end of Friday to all parties. Is that sufficient time? It should be.

MR THOMPSON: Oh, I think so. All I meant is, if we can do it sooner, we will do it sooner.

THE PRESIDENT: All well and good if it is sooner.

There are just two other issues we might usefully consider this afternoon. One is an application by the RHA for, I think, the chief executive and chairman to be admitted to the confidentiality ring - is that right, Mr Flynn?

MR FLYNN: There are two RHA persons. There is Mr Burnett who is the chief executive officer, and Mr Smith, whose title I am just checking - he is the managing director of the RHA. Those are the two persons. The confidentiality issues we do not need to get into now, and have not been too major in the current round. Mechanically it makes the taking of instructions extremely difficult, and we notice that Mr Kaye, who is in an essentially equivalent position in relation to UKTC, is in the inner ring. We point out, and you have seen this in our skeleton, that obviously neither Mr Burnett nor Mr Smith are involved in, as it says, transport operations, purchases of trucks, or the provision of transport services, and we cannot see that the confidential information of the OEMs would be threatened by seeing

it on ring terms, but it would make the taking of instructions better, and of course a great deal faster, given the delays that we have seen in the provision of the confidential information and the somewhat heavy procedure for debating confidentiality when effectively it is open to OEMs to tip anything into the ring, and it is then for us to argue as to why it should come out rather than the other way round.

THE PRESIDENT: Yes, we understand. That is being objected to, is it, by all three of the respondents?

MR FLYNN: I will check the correspondence, but I do believe that is the case. Nobody has acceded to the question. I can look up the correspondence in the bundle, should I need to.

THE PRESIDENT: Running through, Mr Jowell is there really any sensible objection to these two gentlemen, who are executives of the association?

MR JOWELL: I think it is fair to say that Mr Harris is taking the lead on this point.

THE PRESIDENT: But he is not a respondent. His client is not, as I understood it, a respondent to the RHA claim. Is that not right, RHA has not sued Daimler?

MR JOWELL: That is correct, it is not a respondent.

THE PRESIDENT: So his clients are not concerned, are they?

MR JOWELL: Ms Bacon will---

THE PRESIDENT: Ms Bacon's clients are sued?

MS BACON: Yes. If I can just explain, and I ascertained this today from my solicitors, as to the reason for the distinction that is being made. As I understand it, the inner confidentiality ring is limited to external advisers who are not industry employees or working in the sector. That is the basis on which Mr Kaye was admitted. The problem about the two individuals that the RHA seeks to have admitted to the ring is that they do work in the sector. They are not simply solicitors or economists, for example. That is the problem. The whole purpose of the inner confidentiality ring is that it would apply to things that were highly confidential - for example, individual sales figures or prices, and the concern is that for that kind of highly confidential material the confidentiality ring should be restricted to external legal and economic advisers.

THE PRESIDENT: Mr Kaye is not an adviser.

MS BACON: No, and that may be an anomaly, but, as I understand it, Sir, as I have just said, the reason why no objection was taken is that, although he is the representative, he is not otherwise working in the sector. So his role is purely limited to this case. That is not the case for the two individuals that the RHA would have admitted. The fact that Mr Kaye has been admitted on that exceptional basis should not, in our view, mean that a completely

different delineation is made between those who are admitted to the inner confidential and the outer confidential ring.

At the moment, I do not think there is going to be a concern for the funding submissions about any particularly confidential material. Certainly the material that is currently referred to in the skeleton argument of UKTC on the part of Iveco does not arise in relation to the funding submissions.

THE PRESIDENT: Yes. In the first place, we are fixing the substantive hearing for December, and it needs to be sorted out now if that were to proceed. Secondly, there might be other work being done in the meantime aside from on funding. I rather understood that Mr Burnett, to take him first, is the CEO as an employee of the RHA, that he is not running an independent haulier business himself - is that right?

MR FLYNN: Yes.

THE PRESIDENT: So he is not someone who is concerned with buying trucks.

MS BACON: Yes. I think the distinction drawn was between those who are working in the sector and those who are not working in a sector. That was the reason for the distinction originally made. That was why we would maintain the objection, and the anomaly was with Mr Kaye, not with Mr Burnett and Mr Smith. That is just by way of explanation as to how it arose.

THE PRESIDENT: I understand that, but it makes it very difficult, as I think the appellate courts have recently commented on, for legal representatives to take instructions when no one in their client can see relevant documents.

MS BACON: It may be that the issue simply does not arise, because what is at issue is the underlying data used by economists, and that is certainly the case for our confidential material here, but it may not be necessary for those to actually go through the very granular data, and I think that there would be a concern for somebody who is acting in that sector to have access to, for example, individual----

THE PRESIDENT: I do not think it is the granular data, but even in these documents I think it may be your expert's report, if I am right, and parts of the witness statement which are redacted. I do not know if they are redacted from the inner ring or the outer ring.

MS BACON: The relevant redactions are to the annex, or some of the annexes, with the underlying data, underlying sales data, for example, which is extremely granular data. That can be seen, if you have it, in the exhibits to the expert report of Dr Durkin.

THE PRESIDENT: Yes.

MS BACON: If you have the exhibits, one of the best examples is exhibit 3.

THE PRESIDENT: That is in the Iveco bundle.

MS BACON: Obviously I cannot speak to the confidential information of other parties, but this is if you are----

THE PRESIDENT: I think the only other party that has confidential information is Daimler. Nobody else has found it necessary to redact. If you want to treat it as confidential, I am not at the moment questioning that. I am saying why should Mr Burnett, who is not buying trucks, who is a full time employee of the RHA and who would be bound by the undertakings that you give on admission to the ring, not be able to see, not the granular or the data that might have been provided to Dr Durkin, but the annexes or exhibits to his report.

MS BACON: The exhibits to his report do set out that granular data, that is the problem. It is the underlying data. As I said, if you look at exhibit 3, for example, that provides very granular data, and that is what, if you like, you could refer to as 'super confidential information', because that is in the inner ring.

THE PRESIDENT: There is nothing there, so far as I can see, that goes beyond 2011.

MS BACON: That is a different question that we do not need to address at the moment, because I think that is being pursued in correspondence.

THE PRESIDENT: We are addressing it at the moment because that is what Mr Burnett would see.

MS BACON: For example, presumably they would be requesting this kind of data on a more recent basis, if we ever get to certification, because they are going to want to see more recent data. That is a point made repeatedly throughout the replies, that further disclosure would need to be provided, and that would be much more recent than that. No doubt they would be asking for more recent data. I am merely showing you this by way of example as to the kind of granular data that we are talking about that really falls in the super confidential category. It may be that if at some point there were a need for Mr Burnett or Mr Smith to see something, then they could ask for it to be re-designated into the outer confidentiality ring.

THE PRESIDENT: Can this be re-designated into the outer confidentiality ring for starters, in that it does not go back any later than 2011?

MS BACON: Can I just take instructions on that?

THE PRESIDENT: Just before you do that, you will be aware, I am sure, of the various judgments in Luxembourg saying that anything more than five years old, *prima facie*, is not to be regarded as a business secret.

MS BACON: Yes, we did have concerns about disclosing this without any confidentiality protection given that, not least in relation to exhibit 3 that I have just shown you, that relates to third party data. It is not even our own data. So I think that we would have concerns about putting that in the outer confidentiality ring. If the Tribunal were to order that, then we would be willing to do that.

THE PRESIDENT: If we ordered it you would have to do that.

MS BACON: Sir, I phrased that ineptly. We do not resist that, but we would await to do so given the circumstances.

THE PRESIDENT: Thank you. That was Mr Burnett. The other gentleman then is, I think, the managing director, who is a different individual?

MR FLYNN: Yes, he is a full time employee as well, Sir.

THE PRESIDENT: So he does not run a trucks business.

MR FLYNN: He is not one of the board members who runs his own business and does this on the side, he is a full time employee. That is why they have been put forward. We understand the objection to 'in the sector' as Ms Bacon puts it. It depends what you mean by 'in the sector'. They are not active in the sense of----

THE PRESIDENT: They are both in the outer confidentiality ring?

MR FLYNN: They are in the outer ring.

THE PRESIDENT: Just give me a moment.

(The Tribunal conferred)

THE PRESIDENT: Well----

MR HARRIS: Sir, with respect, I would like to be heard on this issue because the order that we are talking about is across both actions. There is a copy of it, if you would like to see it.

THE PRESIDENT: The confidentiality order?

MR HARRIS: Yes, which is in tab 44 of what has been called the supplementary bundle.

THE PRESIDENT: It is a single ring for both actions?

MR HARRIS: That is right, and it therefore means that Daimler confidential information would be, on this basis, being shown.

THE PRESIDENT: At the moment we are just dealing with - you will hear in a moment how we are going to deal with this as regards the Iveco confidential information which does not concern you. We will hear you in a moment.

MR HARRIS: I am grateful.

THE PRESIDENT: What we will say, Ms Bacon, is that we will not at this stage direct that the two individuals, Mr Burnett and the other gentleman, Mr Smith, be placed in the inner ring,

but we will order that the expert's report that is relied on and exhibits in your reply to the application of the CPO should be an outer confidentiality ring document.

MS BACON: Yes. I presume that the Tribunal means that the confidential parts of that report and the exhibits?

THE PRESIDENT: Yes, of course, the confidential parts should be outer rather than inner.

MS BACON: To be outer rather than inner, yes.

THE PRESIDENT: So that Mr Flynn's clients can see it, and they will be well aware of the obligations and undertakings that are given by anyone who is in the outer confidentiality ring, and if you consider in due course what is to be done about more recent information when it arises, which is not at the moment.

MS BACON: Which is not at the moment, exactly. Just before I sit down, at some point I do need to raise a point about the comments of the Tribunal about undertakings and what is expected of us, but it may be that Mr Harris can make his submissions about the----

THE PRESIDENT: Let us deal with confidentiality and then come back to that. That deals with Iveco and does not affect Daimler. Daimler, you have also got rather more significant, I think, redactions, if we can turn to those, which are in the red bundle. You have got this, for a start, in the response to UKTC's CPO. There is one passage, I think, is that right, in the response itself, which is on p.7?

MR HARRIS: There is certainly a redaction on p.7, but I am afraid right now I cannot see what is beneath it. I do not have a version that shows me what is beneath it.

THE PRESIDENT: You mean, what has been redacted?

MR HARRIS: Yes, I have now been handed one.

THE PRESIDENT: I do not think there is any other redaction in your actual response.

MR HARRIS: I do not believe there are - is this right - in the response itself. There is a single redaction in the response itself.

THE PRESIDENT: Is this an outer or inner confidentiality ring redaction?

MR HARRIS: These are inner, and I plainly cannot say in open court what is in it for obvious reasons, but there are, in generic terms and without revealing the confidential information, materials that bear directly upon how Daimler conducts its business affairs and organises its business affairs in the present day.

THE PRESIDENT: Am I right, although you are not a respondent to the RHA claim, your concern is, as regards Mr Burnett and Mr Smith, there is one confidentiality ring, and so they might then see these?

MR HARRIS: There are two concerns. One is the one that you have just mentioned, and the other is that if any of this what we say is inner confidentiality, extremely commercially sensitive material, goes into the outer ring it will be seen by some people within our competitors even though it is current sensitive information about how we conduct our business affairs, and that is obviously not something that the Tribunal should condone, the Competition Appeal Tribunal least of all.

THE PRESIDENT: Mr Flynn, this is not particularly material that Mr Burnett and Mr Smith need to see, is it, because you are not suing Daimler?

MR FLYNN: Daimler produced a combined response and objections to our application. I have some sympathy with Ms Bacon that one should approach this, first of all, as a question of principle before we get into the detail of each particular item of confidential information, which is not something that we have done for the purposes of this exercise. We are simply saying that there seems to be no good reason why Mr Burnett, who is the chief executive, and Mr Smith, who is responsible within the RHA for the proceedings, should not be part of the inner confidentiality ring and subject, of course, to its terms, because they are not in the sector.

Just to remind the Tribunal, there is a list of those redactions at appendix 1 of UKTC's skeleton, where they go through each redaction in each of the documents, making comments on whether or not they should be confidential. We have not done that exercise, we ask simply that, as a matter of principle, Mr Burnett and Mr Smith should be within the inner confidentiality ring. It would be a secondary exercise then to go through each redaction and say whether it was appropriate or inappropriate. What we are trying to do is circumvent the lengthy delays that such a procedure puts on us, and the onus that it puts on us, as it were, to de-justify claims for confidentiality which, in our submission, should have been made first of all by the party claiming it.

THE PRESIDENT: Mr Harris, what is the objection from your perspective to Mr Burnett and Mr Smith being in the inner ring?

MR HARRIS: The objection is, as I mentioned a moment ago, this information that has been redacted is about or bears upon ongoing and current business organisation and business affairs, and the Road Haulage Association, as it says on its website, lobbies on behalf of the road transport industry generally. If one were to turn up Mr Burnett's statement at para.49 he gives a whole series of examples of lobbying and other campaigns that they carry on as we speak. They are all about the organisation of the road haulage industry today. What we say is unfair and inappropriate, and no justification has been put forward for it, is that the

head - and I think Mr Smith, it will be checked, is the managing director of the organisation - so the CEO and the managing director are head of an association, the member undertakings of which and the association of which are engaged in the business of buying trucks and lobbying on behalf of current activity in the activity of buying and using trucks, and they would have access, simply through this litigation, were they to be included in the inner ring, to current and extremely sensitive information about how Daimler carries on its business in that sphere. That is not appropriate.

What might be appropriate, and this might be the way through this, Sir, members of the Tribunal, is that in the usual way if there is somebody in the outer ring who says, or perhaps his or her solicitors say, "Look, I am finding it hard to obtain instructions on this particular topic because there is a document X or Y or Z that my instructing client can't have access to, and on the basis of this evidence and for these reasons that person needs access to this document and that document and that document", then, first of all, they should put that to us and we can take a view, and failing that they should put that to the Tribunal. Those are the sorts of mechanisms that we are well used to. I have not looked it up in the time available to me in this particular version of the order, but it would not surprise me if that provision is in this - it is being whispered to me that it might be para.6.5. Yes:

> "Any party receiving confidential information in these proceedings may request that the party providing the confidential information amend the designation of a document that it has provided."

What one would normally do is go document by document by reference to reasons, and sometimes with some evidence, and we do not have that. There is no explanation given as to why that cannot be progressed in this circumstance.

THE PRESIDENT: When it is your response, and Daimler, am I am right, is an objector to the----

MR HARRIS: To the RHA, correct.

THE PRESIDENT: Yes, so they have an interest in your objection. You have an interest in those proceedings. It is actually in the response. I have to say I find it a little hard to understand why that sentence at the bottom of p.7 is confidential at all. I would have thought it would be fairly well known in the industry. It may be that the further details in Mr Belk's witness statement, some of that is confidential.

MR HARRIS: These are the sorts of things, Sir, that would generally be taken off-line on a document by document basis. The same point, of course, arises in the individual actions. There are people who are not permitted, as we speak today, to be in the inner confidentiality

ring because they have engagement with and oversight of or other involvement in actual truck industry matters. So they are in the outer ring, not the inner ring, but they may want to see a particular document if somebody says, "I can't get instructions because".

What is not at all clear to me, irrespective of the view which we obviously cannot have out today about whether a given example is properly confidential or not, or what the reasons are, what we have not heard today is any specific reason for any specific document, or any specific difficulty about any of these.

The same point - I know we are not having this debate in many ways - really applies to UKTC's lists and they have agreed to take it off-line. They have acknowledged that there is a process by which all of their objections to Mr Belk's redactions should be dealt with *inter partes*, and, failing that, come back to the Tribunal.

THE PRESIDENT: There is a difference, it seems to me, between the actual response and the primary evidence in the response and later data that might be produced to the economists for calculation. I would have thought any client - and there is a big difference, these gentlemen are not truck manufacturers and they are not hauliers, as opposed to the individual actions where the people are purchasers or sellers of trucks. That is the difference with this case.

I think it may be inappropriate to make an order now, but in the first place I would like you, with your clients, to reflect on whether the sentence on p.7 really needs to be redacted at all, and certainly as regards the inner ring; and secondly, to look at the various redactions in Mr Belk's witness statement to see whether they can be reduced or, if they are all outer ring, whether some of them can be inner ring, even if the figures - because there is often a large piece of text in the witness statement which includes certain figures - it may be a particular figure is very confidential but the generic text may not be. I would like you and those instructing you and your clients to reconsider Mr Belk's statement from that point of view.

MR HARRIS: We can certainly do that.

THE PRESIDENT: And I will give the RHA liberty to apply in correspondence, or, following that, reconsideration if it is not taken forward.

MR FLYNN: Yes, I think we stand it over for now.

THE PRESIDENT: Deal with it in that way for now; and as regards in our view that has been resolved. They are, of course, an objector, not a respondent to your client.

MR HARRIS: Sir, we will do that. It is just worth noting for the Tribunal's information that some of the text is redacted because it would go to our competitors, it is not because it will go to the RHA.

THE PRESIDENT: Yes.

MR HARRIS: Be that as it may, we have got the list, we will go through it, we take your point about the end sentence of what that para.13, I think, was.

MR THOMPSON: Can I just spend one minute on my client's concerns. It is obviously not a pressing issue now and it is true that the confidentiality issues have effectively gone to correspondence and the point has been raised about the process under para.6.5 of the confidentiality order. But just so the Tribunal is aware, there are now over 230 members of this confidentiality ring, and it is therefore an extremely cumbersome exercise. It may be needed at some point if something genuinely confidential is ever disclosed, but so far the Iveco material, as the Tribunal has pointed out, dates back to 2011, and the Daimler material, frankly, reading it myself, most of it I could not guess, if it had not been redacted, why it was being redacted, and that reaches a culmination in para. 8 of the Daimler skeleton argument, which quotes verbatim from para. 14.3 of Mr Noble's report, and it is very difficult to see why it was so confidential that nobody must be allowed to see it for four weeks in Mr Noble's report, but it can simply be quoted by Mr Harris in his skeleton argument yesterday. So it does appear to us that there is a risk that it is all a bit of a nonsense which is causing a lot of unnecessary time and money to be wasted, and that Iveco and Daimler should explain why it is that any of this actually warrants any sort of confidentiality protection, let alone the sort of Fort Knox protection that is suggested by Ms Bacon. It does seem to us, subject to the Tribunal's guidance, that it would be helpful for Iveco and Daimler to explain themselves.

THE PRESIDENT: I do not want to take up more time with that now. We have made it pretty clear that, in principle, information that is not current, or the last couple of years, I find it hard to see how that can be confidential. If it is about current pricing, and there may be at some point information about current pricing to do any sort of during and after price comparison, but that is a stage that is probably only reached after certification if they are certified and the cases go forward, and so on. At the present stage matters that impede the taking of instructions, either from your client, even with Mr Kaye in the inner ring, which obviously helps you, so you are not hindered as much as Mr Flynn is, but in general terms for both sets of applicants, it seems to me that has to be justified, and I have made that fairly clear. You have put down your marker.

MR THOMPSON: Yes, our general concern is that this is a bureaucratic nightmare, which does not seem to have any bite.

THE PRESIDENT: I fully appreciate that.

MR THOMPSON: I am grateful.

THE PRESIDENT: I do not think there is any more to say about confidentiality, but there is the question of the undertaking, Ms Bacon.

MS BACON: Sir, yes. A point of clarification first, my understanding is that you would like the undertaking to concern proceedings in this Tribunal only. The other question is the geographic scope of those undertakings. We have discussed this further following the suggestions that the Tribunal made earlier, and we do have a problem at this stage with offering unconditionally, and without further reflection as to how that would work in relation to foreign claimants. There are particular complexities with foreign claimants, as you will have seen from the individual actions, because there may be different limitation rules applicable to those. We have not yet had any opportunity, because today is the first time this has really been ventilated, to explore how that could work. With the Tribunal's permission, we would like to consider that further and, if necessary, make submissions to the Tribunal if we feel that we cannot include those, because we are very concerned about a potentially wide ranging undertaking that could attach to potential foreign members of the proposed classes, particularly in circumstances where, as you have seen, the class definition is not entirely clear, to put it mildly. There are a number of issues regarding the clarity of the class definition that have been raised in the responses that we do not need to go into now, but we do have concerns about that, that issue in particular.

THE PRESIDENT: Yes, foreign class members arises only on the RHA claim, does it not?

MS BACON: Yes.

THE PRESIDENT: Not on the UKTC claim.

MS BACON: Exactly, and it has been described by Mr Flynn as a sort of *de minimis* issue, but we do not want this to become a significant issue, which it might do if we were asked to give undertakings that would include those. Bearing in mind that all of the respondents to the CPOs have objected in the most vigorous terms to the inclusion of these within the proposed classes at all, irrespective of whether, in principle, the CPOs go ahead.

THE PRESIDENT: So what you are saying is you do not have concerns about UK claimants in the Tribunal, but it is about foreign claimants?

MS BACON: That we have particular concerns about. As you have heard, we will need to think carefully about the drafting of the undertaking in any event, but I wanted to flag now that we do have a particular concern about foreign potential claimants.

THE PRESIDENT: In the RHA claim?

MS BACON: In the RHA claim.

MR BEARD: Just to echo, that is the position in relation to DAF. It has the same concerns. We understand that the UKTC claim is limited in relation to UK registered trucks, so it does not arise in relation to that. It is the contentious issue, as Ms Bacon has put it, as to the extension of scope in relation to non-UK trucks. At the moment, the RHA in its reply, essentially as Ms Bacon rightly puts it, sees this as *de minimis*, and even goes so far in 190 of its reply to say that including non-UK trucks could be disproportionate. So it havers somewhat as to its position, but we are concerned about the undertaking being drawn too broadly in relation to that.

THE PRESIDENT: Can you give us just a moment.

(The Tribunal conferred)

THE PRESIDENT: On the basis that the RHA - Mr Flynn, you say this is not a significant part of the claim, as I understand it - that is right, is it not?

MR FLYNN: That is not what we say. What we say is that the numbers - we have had this discussion more than once, and I know that Mr Jowell will want to say something about it - of foreign trucks currently, as it were, included in those signed up to the RHA claims, and what we say in 190 is that we accept that at the moment it is relatively small.

As discussed last time we were here, firstly, it is only a snapshot. We do not know how many there will be at the end of the day. We do not say they are *de minimis* and can be ignored, we are saying that at the moment the numbers are not that high. What I said to you earlier is, who knows what limitation points might arise in respect of such foreign owned trucks that would be part of our claim if we were certified in respect of that limb of the claim as well.

In my submission, the way to address Ms Bacon's concerns, if you are persuaded by them, is, as you did not put it in these terms, effectively the stay you have ordered has a *quid pro quo* that the applicants will not be prejudiced by limitation issues. You could grant a liberty to apply in respect of that based on some properly formulated objection of principle that Ms Bacon and her clients might wish to put forward. It should be that way round rather than the other, given that, at the moment, no one can say how many foreign trucks might be included within our class or where they are located. It is a question of principle that a limitation point would not be taken against us solely by reference, as I think you said, to the accruing of time due to the stay which you have ordered today.

MR BEARD: I do not know if it assists, but we would need to go away and take instructions, but hearing Mr Flynn we would maintain the position that no undertakings should be given in relation to these matters, but if the concern were in relation to those claimants that are

already registered with the RHA and the 600 trucks that concerns, there may be scope for compromise in relation to these matters.

THE PRESIDENT: I am not sure it is so limited. I think it is about foreign claimants that might have signed up too----

MR BEARD: We do object to the idea of providing an undertaking on that basis.

MR FLYNN: It is a question on a point of principle, and we explained to the Tribunal last time that there are people who are interested in the claim but are waiting to see whether the RHA will be authorised, and that, as we have explained, we would expect to lead to a substantial increase of claims, particularly it might be said by the more sophisticated bodies, who are watching and waiting and will be aware of the limitation issues that other people are putting forward. So, as it were, present performance is no guide to future performance in relation to this, and in my submission the question of principle on limitation should apply across the board, or otherwise a significant potential element of our claim may be compromised.

THE PRESIDENT: We would be able, would we, to direct, irrespective of any undertaking that effluxion of time between the date for hearing and the adjourned date for hearing, whenever that may be, should not count towards a period of limitation?

MR FLYNN: I should like to think that you could do, Sir, but if you ask me what is the statutory authority standing here, I cannot point you to it, nor to the procedural one. I do not see why not, but I do not actually see why the respondents should not extend comfort in the terms that you originally proposed, if they come with a reason other than, "We don't really want to and we think this is a small part of the RHA's claim", which we have explained. If they don't come up with an additional reason then they should not be dispensed from it, in my submission.

THE PRESIDENT: Yes.

MR THOMPSON: Just to say, I had understood the judgment to be conditional on such an undertaking being given. I think it would be best if the timetable said that, by four o'clock on Friday, the respondents come up with their undertakings and then the Tribunal and indeed UKTC and RHA can make submissions as to whether or not the undertakings are satisfactory, because at the moment, exactly as we were concerned by, there seems to be a lot of sliding around by the potential defendant/respondent objectors as to what it is that they might or might not give, and that is a very uncertain basis on which a stay should be ordered.

THE PRESIDENT: Yes, I do not think it affects your claim, however, because I think as regards UK registered trucks the position is clear.

MR THOMPSON: Yes.

THE PRESIDENT: Just give us a moment.

(The Tribunal conferred)

THE PRESIDENT: Mr Beard, did I understand that you said that DAF would be prepared to do it for those foreign claimants who have signed already?

MR BEARD: Yes, we would be willing to do that in relation to what has been put forward, yes, a compromise in the circumstances to get round this. I have got to take confirmatory instructions, but that is the message I have received.

THE PRESIDENT: Ms Bacon?

MS BACON: I was just taking instructions on whether we can do the same.

THE PRESIDENT: And MAN also needs to take instructions?

MR JOWELL: Yes.

MS BACON: It is yes from us.

THE PRESIDENT: Well, we will restrict it on that basis to the claimants. We are not at all sure, Mr Flynn, that we would have power - it may well be a matter of foreign statutes of limitation whether we have power to, as it were, prevent them being relied on under the relevant foreign law. It may be quite a complicated question, and it might be answered differently according to different foreign laws.

MR FLYNN: Indeed, Sir, and that would be a good reason, in my submission, for suggesting that they should give the same undertaking in relation to those jurisdictions as they are currently prepared to do in respect of the United Kingdom.

THE PRESIDENT: Yes, although it may not be insignificant, it is not the main thrust of the claim or the main concern of your clients for obvious reasons. We appreciate there is a potential for prejudice to some potential new class members. We see that, but I think that is a price we are going to have to pay.

MR THOMPSON: I am grateful, Sir.

THE PRESIDENT: Is there anything else that we should deal with. We will await confirmation from UKTC about the funding, a proposed timetable for the hearing on funding in June for two days, with one in reserve, and you will be approached by the Tribunal for six days in December, and we suggest six because the funding will be largely or entirely out of the way, so one is left with lesser issues and six days, it seems from what we have, should be adequate.